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**The Aristocrats of Intellectual Property: How
Modern Enclosuristic Practices have Fuelled the
Internet Piracy Revolution**

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THE ARISTOCRATS OF INTELLECTUAL PROPERTY:
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REVOLUTION

ABSTRACT

Modern intellectual property laws possess an unreasonably narrow focus on economic “incentivism” and pecuniary exploitation, which is problematic because it fails to address larger social welfare issues. This paper explores the genesis of two significant and chronologically overlapping legal evolutionary processes, that occurred in England during the 16th to 18th Century, to account for the development of this overly narrow economic focus.

The first legal process would be the conception of intellectual property laws as a result of British guild influence during the industrial age. This has accounted for the asymmetrical development of intellectual property laws, which favour right-holder protectionism and seeks to combat the growing ease of copying that technology offers.

The second process is the medieval English “Enclosure Movement”, which academics use to draw similarities between the privatisation of common lands used by rural peasants and the contemporary propertisation of intellectual resource. The effect of intellectual propertisation grants right-holders exclusionary rights and contributes to the growing lack of access to intellectual goods by the masses.

Next, this essay explores the role that multinational conglomerates have played in fostering stronger global intellectual property rights and creating informational scarcity. Corporations do so through overzealous lobbying and unfortunately, the effects of which are not confined within a domestic level, and have an upward vertical transfer on an international level as well.

Lastly, the consequential effects of intellectual propertisation are explored through the use of several case studies. Firstly, in the case of the AIDS pandemic, the inflation of pharmaceutical drug prices have effectively deprived those afflicted from accessing the necessary medicines needed to alleviate pain and prolong life. Secondly, in the case of the informational commons of the Internet, continual Governmental attempts to regulate the Internet have instead conversely accounted for the proliferation of illegal file-sharing activities.

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INTRODUCTION

The Present Conundrum

In the simplest of explanations, the term “intellectual property” encapsulates a product borne of an individual’s intellectual labour; the process of thought, imagination, invention and creation. The resultant expression or product of that intellectual pursuit, is then “enclosed” or “privatised” under copyright or patent law, made subject to the right of proprietary ownership. Along with that proprietary ownership is attached a bundle of auxiliary beneficiary and exclusionary rights.¹ This grants the owner a duality of rights to not only exploit his intellectual work through its sale or rent, but at the same time it also affords him a discretionary power to control who may then have access to enjoy or use the said product.²

That definition, however, in reality is quite nebulous.³ As a result, the legal barriers set in place to safeguard a right-holder’s intellectual property have eroded to the point where an ordinary lay-person finds it hard to distinguish between lawful usage and infringement.⁴ Contributing to this erosion is the surge in the number of technologically-savvy individuals who are emancipated from the inconvenience of the physical world of print and paper, but are instead well-versed in the ease of file-sharing that is associated with the virtual-plane of the Internet.⁵ The freedom, anonymity⁶ and neutrality⁷ associated with the Internet has thus allowed for the creation of an ill-conceived expectation (amongst modern consumers) that anything and everything freely downloadable from the Internet is in fact free.⁸ At a glance, who can blame them? Where the overpricing of books, movies, music and every other

¹ Severine Dusollier, “Sharing Access to Intellectual Property Through Private Ordering” (2007) 82(3) *Chicago-Kent Law Review* 1391, 1391 - 2.

² Adam B Jaffe and Josh Lerner, *Innovation and its Discontents* (Princeton Press, 2004) 4 - 5.

³ *Biogen Inc v Medeva PLC* (1997) 114 RPC 1 (UK) per Lord Mustill.

⁴ Steven J Horowitz, “Copyright’s Asymmetric Uncertainty” (2012) 79 *University of Chicago Law Review* 331, 333.

⁵ Adam D Moore, *A Lockean Theory of Intellectual Property* (Dissertation, Ohio State University, 1997) ii.

⁶ Stefan Larsson and Mans Svensson, “Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File Sharing” (2010) 2(4) *Policy and Internet* 77, 79 - 80.

⁷ Lawrence Lessig, *The Future of Ideas: The Fate of The Commons in a Connected World* (Random House Publishing, 2001) 36 - 7.

⁸ Ken Shao, *Copyright Battles Shouldn’t be Fought for the Wrong Reasons* (2011) Global Times China <<http://opinion.globaltimes.cn/commentary/2011-05/655294.html>> at 29 August 2012.

conceivable form of intellectual property is the norm in today's society; it is no wonder that Internet pirates are being hailed by Internet "geeks" as cult-heroes, revolutionaries and virtual Robin Hoods fighting against greedy corporate overlords.⁹

Mainstream intellectual property theory however persistently insists that the overpricing of intellectual goods are justified. On the basis that pecuniary reward is a necessary mechanism embedded within intellectual property rights to provide creators and authors with an incentive to continually create or innovate and that the element of incentivism is thus directly proportional to the effect of stimulus.¹⁰ Which is to say, the more financial gain afforded, the larger the impetus to create. This assumption conversely condemns piracy since legislation criminalises unauthorised copying and also undermines the future creative output of the creator due to his loss of financial gain. Yet, such an assumption is argued by dissenting academics to be inherently flawed when considering this simple scenario: are markets lost or is harm wrought onto the creator when an individual downloads a song that he never subjectively intended to purchase in the first instance?¹¹

Setting aside the debate of whether online piracy is ever justified as a retaliatory response to the overpricing of digital content, consider instead whether the mainstream assumption about the current system of intellectual property is true. Especially with regard to the larger social implications that arise from the issue of global accessibility to medicine. The creation of pharmaceutical drugs is undeniably seen as the noblest of human productions and yet it is neither freely accessible nor freely disseminated. Medication is priced expensively, and is overzealously coveted and protected by large pharmaceutical corporations for the sake of economic exploitation. In that regard, should civil disobedience be favoured instead as a revolutionary response; where the illicit reproduction of generic drugs actually affords society more boon than it does bane?

The crux of this contemporary conundrum is therefore as Jeremy Waldron astutely observed; simply a matter of perspective. The line between infringement and free enterprise is a fine one. Which is to say that if people respect a creator's right to profit from his intellectual

⁹ The Wall Street Journal, *Pirate Bay: Heroes or Criminals?* (2009) <<http://blogs.wsj.com/digits/2009/04/13/pirate-bay-heroes-or-criminals/>> at 7 September 2012.

¹⁰ Nicholas P Suzor, "Access, Progress, and Fairness: Rethinking Exclusivity in Copyright" (2012) 15 *Vanderbilt Journal of Entertainment and Technology Law* 1, 1.

¹¹ Stuart P Green, *When Stealing Isn't Stealing* (2012) The New York Times <http://www.nytimes.com/2012/03/29/opinion/theft-law-in-the-21st-century.html?_r=2&adxnnl=1&pagewanted=all&adxnnlx=1333108962-MMcE/mz1IjRA34OYsq88Ag#>> at 29 September 2012.

endeavours, then the copier is perceived as nothing more than a thief. If, however, the perspective is inverted; where the author is seen as nothing more than a statutory monopoly, then copying is justified since the copier merely epitomises the ideals of free enterprise.¹²

This paper argues that the contemporary conundrum posited above is a result of the historical development of intellectual property laws, which has been moulded over time through the influence of corporate entities. This paper further explores the detrimental effect that the incremental strengthening of intellectual property laws has had on consumers. And explains how the marginalisation of consumers has attributed to the proliferation of piracy as a natural counter-intuitive response towards promoting freedom of access to informational and intellectual goods.

First, Part I of this paper explores the historical creation of intellectual property laws, which emerged as a result of the influence British guilds had over the Monarchy during the 16th Century. This proves that from the initial creation of intellectual property laws, social welfare and the ideals of free dissemination of knowledge was of little importance to medieval legislators. This is further contrasted against the modern economic justifications that proponents of intellectual property rights adopt in their bid to promote the strengthening of pre-existing intellectual property rights. Second, Part II then discusses the chronologically overlapping legal formative process of the medieval British “enclosure movement”. And further discusses how the British nobility strove to deprive peasants of common lands and defended their actions by citing the inevitable *tragedy* of resource overuse if the commons were allowed to persist. Third, Part III then compares the similarities and dissimilarities that modern interpretations of intellectual enclosure had to its medieval predecessor. And also raises the pertinent issue of who the aristocrats are in today’s modern context so as to adequately identify the rationale behind the need for stronger intellectual property rights. And finally, Part IV of this paper focuses specifically on the modern debate surrounding the Internet. Exploring not only the need for fairer-pricing of digital content but also the relaxation of restrictive interference from private and public bodies alike. This is because tighter regulatory control in reality propagates more instances and sophisticated methods of piracy. Lastly, this essay also considers examples of revolutionary market practices which could quell consumer dissatisfaction; by allowing increased affordability and accessibility of intellectual and informational goods for the masses.

¹² Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1993) 68 *Chicago-Kent Law Review* 842, 842 - 3.

PART I - THE HISTORICAL CONCEPTION AND JUSTIFICATIONS OF INTELLECTUAL PROPERTY

1. A Brief History of the Anglo-American Model of Intellectual Property Law

In tracing the genealogy of intellectual property rights back to its roots, it would prove futile to identify a singular source of origination since such rights developed separately and independently as a result of geographical and ideological differences.¹³ However, the most readily recognisable instance of creation would be that of the British model of intellectual property rights, which arose in response to the emergence of guild monopolies and the later industrialisation of mechanised commercial printing and manufacturing from the 16th to 18th Century.¹⁴

The significance of British guild influence on the creation of intellectual property laws can be attributed to the high revenue taxes and licensing fees paid to the Monarchy. Any disruption to a guild's business through the illegitimate replication of their intellectual property thus meant a disruption in Crown payments. The threat posed by both the commercial printing press¹⁵ and mechanised manufacturing equipment, which allowed for the newfound ease by which counterfeiters could replicate literary works and products, was therefore a great cause for concern to the Monarchy. Causing the Monarchy to take responsive legal measures to protect its lucrative guild cash cows which allowed guilds to maintain proprietary control and exclusionary rights over their works and products.¹⁶

Further, during which time, Britain was in a state of fierce economic and technological competition, not only amongst its European neighbours but also with more technologically

¹³ Ken Shao, "Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property" (2011) 41 *Hong Kong Law Journal* 731, 731 - 2. Dr. Shao's investigation has revealed that besides the British guild and monopoly related origins of intellectual property laws, there too were independently emerging forms of copyrights and patent laws from France and China during the 16th Century. Both of which did not merely have a monopolistic agenda. In that regard, there are better theoretical bases than just monopoly to criticise the overprotection of intellectual property rights.

¹⁴ Ibid.

¹⁵ Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on Intellectual Property Law* (Foundation Press, revised 5th ed, 2005) 233 - 6.

¹⁶ Assafa Endeshaw, "Intellectual Property Enforcement in Asia: A Reality Check" (2005) 13 *International Journal of Law and Information Technology* 378, 378.

advanced Asian civilisations (China and India).¹⁷ Intellectual property laws were enacted by Britain as a two-pronged approach towards becoming more competitive, and achieving dominance in the technological arena. First, copyright and patent laws were seen as means of preventing the transfer of knowledge through literature and the transfer of innovation through invention beyond its national border via illegal replication.¹⁸ Secondly, an ancillary purpose of intellectual property laws, as previously mentioned, was then to prevent the sale of illegally replicated products from disrupting the businesses operated by guilds within international markets. By doing so, the British were able to create trade exclusivity over its commodities and was consequently able to generate the requisite pulling impetus necessary to draw merchants to its shore.¹⁹

The reformation of British immigration laws at that time will further prove how important the Monarchy viewed technological dominance. By offering attractive resettlement incentives, more favourable apprenticeship terms and cheaper rents for guilds. Further coupled with enforceable proprietary rights by inventors, the British were able to procure desirable technologies by inducing defection of the mobile skilled immigrants from its regional neighbours and colonies. The influx of skilled immigrants, brought with them valuable expertise in the fields of mining, metallurgy, tool making, building, chemistry and textile manufacturing. The combination of both aggressive immigration reforms and the effective implementation of intellectual property laws saw the rapid economic development and expansion of the British empire in comparison to that of their Asian²⁰ competitors.²¹

An additional motive for the British Monarchy to enforce stricter intellectual property laws was for the purposes of censorship. For example, in 1557, the London Stationer's Company was formed and sanctioned by the Crown. As a result of this royal patronage, the Crown maintained a veto right to ban or prohibit the dissemination of any literary works that were

¹⁷ Stephan R Epstein, *Transferring Technical Knowledge and Innovating in Europe, c.1200 – c.1800* (Workshop Paper, presented for LSE Research Online, 2005), 1.

¹⁸ Endeshaw, see note 14 above, 379.

¹⁹ Epstein, see note 17 above, 2.

²⁰ For more information on why the British were able to overtake the Chinese's innovative capacity see: Peter K Yu, "Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the US-China intellectual Property Debate" (2001) 19 *Boston University International Law Journal* 1, 24. In his paper, Yu states that the Chinese regarded foreigners with much skepticism and xenophobia and rejected King George III's diplomatic efforts to establish an innovative and informational trade channel between the two nations during the Qing dynasty. This proud "nationalism" according to Yu has "brought China two centuries of tremendous pain and humiliation" in relation to their innovative capacity.

²¹ Epstein, see note 17 above, 33.

deemed to be morally abrasive, blasphemous or slanderous to the Monarchy (especially the ruling Royal family). This *quid pro quo*, between the British Crown and the guild, gave the guild exclusive monopoly over all printing and licensing rights for British literary works.²²

The historical conception of intellectual property, in the context of the British model, was meant to be a self-serving form of protectionism aimed at furthering national economic interests by intentionally suppressing knowledge.²³ The British model was therefore uninterested in the resultant long term side-effects that it would create in terms of stifling harmonious global development; or global social welfare; or knowledge dissemination and accessibility.²⁴ Unfortunately however, the measure of success that the British intellectual property model offered, in terms of economic growth and development, was far too great for other emerging innovative markets to ignore. And in a bid to be equally competitive, America enacted its own intellectual property regimes, which in essence emulated and built upon the legacy of the British model²⁵; granting right-holders exclusive proprietary ownership over any of its registered works/products while at the same time enforcing heavy penalties on infringers and allowing compensation for the wronged parties. The adoption of the British model has worked for the Americans and this has attributed to an indisputable technological frontier shift from the British to the Americans²⁶, who in their own right have now become the leading technological powerhouse in today's global innovation market.²⁷ But as a result of the adoption of the competitive British intellectual model, the contemporary Anglo-American intellectual property regime has also perpetuated the inherently selfish agendas and shortfalls of its predecessor.

²² Shao, see note 13 above, 11.

²³ Endeshaw, see note 16 above, 378.

²⁴ Joseph Gibbons Llewellyn and Xiao Li Wang, 'Striking the "Rights" Balance Among Private Incentives and Public Fair Use in the United States and China (2008) 7 *John Marshall Review of Intellectual Property Law* 488, 489.

²⁵ John G Byrne, "Changes on the Frontier of Intellectual Property Law: An Overview of the Changes Required By GATT" (1995 – 1996) 34 *Duquesne Law Review* 120, 124.

²⁶ Bruce Willis Bugbee, *Genesis of American Patent and Copyright Law* (Public Affairs Press, 1967) 39.

²⁷ Economist Intelligence Unit, *A New Ranking of the World's Most Innovative Countries* (2009) <http://graphics.eiu.com/PDF/Cisco_Innovation_Complete.pdf> at 7 September 2012.

2. Justifications in Defence of Intellectual Property Laws

In spite of the seemingly selfish agendas behind the formation of intellectual property laws, there are also equally persuasive and logical justifications which support the existence of such laws. The first theoretical justification is derived from John Locke's "Labour Theory".²⁸ Locke's labour theory stipulates that all men have a right to own the fruits of his labour, much like how a harvest belongs to a farmer, then so too should a book belong to an author.²⁹ With that ownership, comes the natural assumption that the owner can then dispose of or alienate his property as he pleases and that includes the discretionary right to sell or bar usage to anyone so as to protect his own interests.

A novel justification of intellectual property laws can be found in Adam Moore's contemporary interpretation of Locke's natural rights theory.³⁰ In his dissertation, Moore defends intellectual property on two fronts. The first being that intellectual resources are non-rivalrous³¹, which is to say that intellectual works can be created, possessed, owned and consumed by many individuals concurrently without injury. This goes towards satisfying Locke's rule-utilitarian, which states that ownership over a previously un-owned object should be allowed where granting exclusive ownership causes no harm to any other through deprivation. Moore then argues that the frontier of intellectual pursuit is infinite given that an individual's ability to create is independent and spontaneous. In quoting Locke: "nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left to quench his thirst...".³² Moore stresses his point again; that intellectual property rights are justified at both the level of acts and at the level of institutions since it does not actually cause injury or deprivation to the consumer even though a right-holder has exclusive ownership over an intellectual good.³³

By way of a simple illustration, it can be argued that in the instance of the popular mobile telephone, no bane is created nor is prejudice caused through the exclusive ownership of patents associated with a mobile telephone. For example, in the ordinary lifespan of a

²⁸ John A Simmons, *The Lockean Theory of Rights* (Princeton University Press, 1992) 1 – 12.

²⁹ Madhavi Sunder, "Copyright, Culture, Copyright History: Introduction" (2011) 12 *Theoretical Inquiries in Law* I, II.

³⁰ Moore, see note 5 above.

³¹ *Ibid*, at iii.

³² Peter Laslett (ed), *John Locke's The Second Treatise of Government* (New American Library, 1965) Chapter 5, para 33.

³³ Moore, see note 5 above, 7 - 8.

consumer, there is no expectation for the consumer to acquire the experiential skills or expend the effort necessary to invent a device that allows him to communicate wirelessly with another. In that regard, though the consumer might have to part with some of his own hard earned money, his life is still enriched by the convenience that comes with the purchase and subsequent usage of a mobile telephone. In fact, the convenience and enjoyment derived from the mobile telephone is directly consequential to the right-holder's exclusive ownership of the intellectual property.

The next set of justifications are also derived from theoretical Lockean reasoning and is oriented more towards the economical aspect of intellectual property. This vein of Lockean reasoning suggests that property has a vital role in encouraging the expenditure of individual effort since disposal can be initiated with the remittance of money.³⁴ The commodification, or the propertisation of any intellectual endeavour grants the owner the ability to charge another a pecuniary premium for the use of his property. This carries with it an element of incentivism, in the sense that an author or inventor may be motivated to create or innovate a commercially viable intellectual product, with the promise of financial reward through royalties.³⁵ And after having gained financial success, the author or inventor would also be in a better position to fund further attempts at creating more intellectual goods. Intellectual property protection also gives an inventor or author the proper assurance that he will be given due recognition for his hard work as others are prevented from branding his protected property as their own or from making illicit replicates. Furthermore, this confidence to present a protected work to the public would also generate social progress and would in theory perpetuate creativity by inspiring others to invent and create.³⁶

And lastly, as Douglas North suggests, the economic rationale of propertisation and the subsequent attachment of pecuniary value onto intellectual goods also provides a crucial impetus needed to drive global trade. What North means is that by attaching costs onto intellectual property, it promotes an efficient process of exchange and transference between the vendor and purchaser, since only those who can fully maximise the use of an intellectual good will invest the monies necessary to obtain it.³⁷ This economic theory as propounded by

³⁴ Christopher May, "Unacceptable Costs: The Consequence of Making Knowledge Property in a Global Society" (2002) 16(2) *Global Society* 123, 125.

³⁵ Ibid, 126.

³⁶ Alfred Yen, "Interdisciplinary Future of Copyright Theory, The Intellectual Property and the Construction of Authorship" (1991 – 1992) 10 *Cardozo Arts and Entertainment Law Journal* 423, 424.

³⁷ Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge Press, 1990) 35.

North further encourages market segregation and the discriminatory effect that the high pricing of intellectual property creates; by separating those who are both ill-equipped and inadequately financed from obtaining the intellectual goods. This according to North prevents wastage of intellectual resource and encourages innovation.³⁸

3. The Theoretical Conflict: Criticisms of Intellectual Property Laws

Even with all the persuasive arguments for intellectual property laws, there are those who remain unconvinced that the propertisation of intellectual goods benefit human civilisation as a collective. One such criticism argues that commodification of the intellectual commons is perceived to cure an ailment which does not actually exist within the realm of creative thought.³⁹ Proponents of intellectual property advocate the stimulating or catalytic effect financial incentivism has towards innovation, but evidence suggests otherwise.⁴⁰ For example, prior to the creation of genetic patents over plant biology, there already existed a fertile breeding ground of innovative advances which was independently spurred by enthusiasts and husbandry societies in the absence of financial incentive.⁴¹ This exchange of ideas for the improvement of existing agricultural stock occurred through agricultural exhibitions, state county fairs, local newsletters and through the interaction of like-minded enthusiasts.⁴² Further empirical studies conducted by Moser also serves to rebut the viability of the incentive argument. Moser's investigation revealed that the effect of patent systems did not evince a clear ability to raise the innovative potential of a nation; since there was little difference in terms of innovative activity between nations with patent laws and those

³⁸ North, see note 37 above, 34. This however contradicts with the notion that intellectual resources are in fact "non-rivalrous" and cannot therefore be subject to wastage or overuse, for more information on this debate, see page 27 below, at notes 131 and 132.

³⁹ Michele Boldrin and David K Levine, *Against Intellectual Monopoly* (Manuscript, Department of Economics University of Minnesota, 2005) Chapter 8, 4 - 5.

⁴⁰ Ned Rossiter, "Creative Labour and the Role of Intellectual Property" (Report, for Monash University, 2004) 1, 6. According to Rossiter, when surveyed through his report, many commentators stated that income generated from their creative works was of very little importance especially those in the field of academic studies. And also, creative output was not the primary income of most, as such endeavors were pursued during "spare time" and was driven primarily by interest and passion.

⁴¹ J I Stallman, *Impacts of the 1930 Plant Patent Act on Private Fruit Breeding Investment* (Unpublished doctoral dissertation, Michigan State University, 1986) 3 - 7.

⁴² H B Tuckey, "History of the American Pomological Society: History of Fruit Growing and Handling in the United States of America and Canada" (1976) *American Pomological Society* 1860, 1866.

without such laws.⁴³ Academics like Boldrin and Levine also warn against the use of incentivism as a driving impetus for innovation as it often replaces genuine innovational enthusiasm with an insatiable desire for pecuniary gain. It is this notion of capitalistic greed, according to them, that has accounted for the “exclusion of as many people as possible from fruitful intellectual intercourse”.⁴⁴ The criticisms of intellectual property are directed at the duality of rights, both the inclusionary and exclusionary, that are inherently created at the time an intellectual good is commodified. By allowing the right-holder to reap financial reward, or as Runge and DeFrancesco described as “being included in such a stream of [pecuniary] benefits”⁴⁵, it creates an antagonistic relationship between the right-holder and every other individual. The resultant goal of the right-holder therefore is to maximally exercise his exclusionary rights; to selfishly safeguard his profit and prevent the outward leakage of any such profits.⁴⁶

Besides criticisms made against the pragmatic aspects of economic incentivism, there are also those who criticise intellectual property’s theoretical justifications. Such dissidents, often referred to as control-critics⁴⁷, such as James Boyle⁴⁸ and Yochai Benkler⁴⁹ argue that the increasing privatisation and control of intellectual property has accounted for the phenomena of “enclosure” and the continual disappearance of the “creative commons”. By legally providing right-holders with control over their intellectual property, it then in turn restricts freedom of access and reduces the availability of information. This reduction of critical creative inputs within the masses would then in turn stifle future creative output since new expressions of ideas are essentially a further development of existing well-known information.⁵⁰ As succinctly put by Sir Issac Newton, “[we all] stand on the shoulders of

⁴³ Petra Moser, *How do Patent Laws Influence Innovations? Evidence from Nineteenth-Century World Fairs* (Working Paper 9909, for the National Bureau of Economic Research, 2003) 7 - 9.

⁴⁴ Boldrin and Levine, see note 39 above, Chapter 8, 5.

⁴⁵ C Ford Runge and Edi DeFrancesco, “Exclusion, Inclusion and Enclosure: Historical Commons and Modern Intellectual Property” (2006) 34 *World Development* 1713, 1714.

⁴⁶ Adam Mossoff, “Exclusion and Exclusive Use in Patent Law” (2009) 22 *Harvard Journal of Law and Technology* 321, 328 - 9.

⁴⁷ Polk R Wagner, “Information Wants to be Free: Intellectual Property and the Mythologies of Control” (2003) 103 *Columbia Law Review* 995, 996.

⁴⁸ James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 *Law and Contemporary Problems Journal* 33.

⁴⁹ Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain” (1997) 74 *New York University Law Review* 354.

⁵⁰ *White v Samsung Electronics. America Inc.* (1993) 989 F.2d 1512, 1513 (United States Court of Appeals for the 9th Circuit) per Judge Kozinski’s dissenting judgement.

giants”⁵¹, alluding to the dictum that all human brilliance is based off the efforts of our predecessors and without access to past works, future generations will experience a dearth of creativity.

Control-critics demand that intellectual goods be disassociated from real property rights, owing to the fact that both remain far too distinctive, in nature and subject matter, to be treated as equals. This notion, that “the rhetoric and economic theory of real property are increasingly dominating the discourse and conclusions in the very different world of intellectual property”⁵² has become a growing consensus amongst dissenting academics. One such dissenter, Christopher May further expands and exemplifies this growing consensus by raising two simple yet pertinent questions: (1) who ultimately benefits from the institutions of intellectual property and (2) what problems do they actually address or alleviate?⁵³ By urging others to consider who the beneficiaries of intellectual property regimes are, May emphasises the growing asymmetry in the apportionment of rights between users and right-holders, and also the excessive profiteering by intellectual property right-holders.

4. The Governmental Responses of Brazil, South Africa and the International Community: A Case Study of the AIDS Pandemic

In considering the two questions raised above, May uses the case study of the global AIDS pandemic to further drive home the problems that plague intellectual property - at a macrocosmic level, when used to address global social issues, the economic justifications of intellectual property fails miserably. Since, firstly, intellectual property serves only its master; right-holders, which are often large corporations driven by economic incentive.⁵⁴ Secondly, intellectual property does little to address social health issues nor does it allow for increased accessibility of protected goods, since such notions are adverse to the corporation’s own profit-oriented interests.⁵⁵ Even in relation to AIDS medication there is no exception, and it is priced by large pharmaceutical corporations to allow for maximum generation of

⁵¹ Issac Newton, Letter from Issac Newton to Robert Hooke, (Feb. 5, 1675), reprinted in Robert K. Merton (ed), *On the Shoulders of Giants: A Shandean Postscript* (1993).

⁵² Mark Lemley, “Romantic Authorship and the Rhetoric of Property” (1997) 75 *Texas Law Review* 873, 895.

⁵³ May, see note 34 above, 127.

⁵⁴ Dean Alger, *Megamedia: How Giant Corporations Dominate Mass Media, Distort Competition and Endanger Democracy* (Rowman & Littlefield Publishers, 1998) 2343 - 4.

⁵⁵ May, see note 34 above, 127 - 8.

profit.⁵⁶ This over-pricing accounts for the high annual expenditure for an individual suffering from AIDS, which is estimated to be 10,000 times higher than the average per capita health related expenditure of many developing states.⁵⁷ The effect of which places the cocktail of pharmaceutical drugs, necessary for the alleviation, suppression and treatment of AIDS, far beyond the financial reach of sorry plight nations such as Ghana, Brazil and South Africa.

As indicative from a survey conducted by UNAIDS in 2002, it is estimated that out of a total of 40 million people infected with the HIV virus living in developing nations, a resounding 90% (36 million) have no access to the cocktail of anti-retroviral drugs needed to prolong their lives.⁵⁸ This lack of access is thus the primary cause for the death of millions of the poor afflicted with HIV each year.⁵⁹ In a desperate bid to gain access to the necessary medicines, the above mentioned nations sought to import generic versions of the medication from India (which was producing generic AIDS medication in direct contravention of its own TRIPS⁶⁰ Agreement provisions). This prompted several pharmaceutical companies to reduce prices⁶¹, but not significantly enough to allow for affordability.⁶² In the case of Brazil, legal action was commenced by America (on the urging of Merck - a pharmaceutical corporation⁶³) at the World Trade Organisation (“WTO”) to prevent the use of counterfeit

⁵⁶ Flynn, Hollis and Palmedo, “An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries” (Paper presented at the South African Competition Commission, South Africa, 22 May 2008) 5 - 7.

⁵⁷ May, see note 34 above, 134.

⁵⁸ Rosine Jourdain, “Intellectual Property Rights and Public Health in the Revised Bangui Agreement in Bellman”, Dutfield and Melendez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (2003) 143, 143 - 4.

⁵⁹ Alan Berkman, “Symposium - The Global AIDS Crisis: Human Rights, International Pharmaceutical Markets and Intellectual Property” (2002) 17 *Connecticut Journal of International Law* 149, 149 - 51.

⁶⁰ The Trade-Related Aspects of Intellectual Property Rights Agreements or also referred to as the “TRIPS Agreement”. Available at the World Trade Organisation Website: <http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm> at 29 September 2012.

⁶¹ “AIDS Alms: Five Drug Makers Agree to Slash Prices for Developing Nations” *Wall Street Journal* (New York), 12 May 2000, 28.

⁶² May, see note 34 above, 134.

⁶³ Frederick M Abbott, “Seizure of Generic Pharmaceuticals in Transit” (2009) 1 *World Intellectual Property Organisation Journal* 43, 47. According to Abbott, there were other ways in which Merck tried to prevent Brazil from receiving other needed medicines as well. For example, Merck asserted pressure on the Netherlands government (in which country Merck held patent rights) in order to seize a generic form of Losartan (a type of medication used to treat high blood pressure), in transit from India to Brazil.

medications protected under American intellectual property laws.⁶⁴ This apathetic act by the Americans could only be seen to be encouraged by the pharmaceutical right-holders and caused sceptics to question the antagonistic ulterior motives of the American legislators and governments which, in this case, clearly favoured the enforcement of the owner's rights over the lives of those who could have been saved if only they were granted access to the medication.⁶⁵

Brazil's Response: The response adopted by the Brazilian government in retaliation against Merck's apparent legal actions has been praised by the international community and Brazil has now become a paragon for developing nations leading the fight against large pharmaceutical corporations.⁶⁶ Shortly after the commencement of the legal action Brazil responded by threatening pharmaceutical companies within its borders that it would be imposing compulsory licensing.⁶⁷ The implementation of such intellectual property reforms would in effect allow the Brazilian government to make use of the patents protected so dearly by the pharmaceutical companies without requiring their consent. And this compulsory license would further allow limitless reproduction of the said protected medicines, all for a fixed nominal fee and without any subsequent payments of royalties.⁶⁸ This threat alone, as noted by Pedro Roffe, was sufficient for the large pharmaceutical corporations to withdraw any legal action and to "reduce the price of individual HIV/AIDs retroviral drugs by up to 75 per cent".⁶⁹ Though other nations have tried to emulate Brazil's actions, by threatening to similarly impose compulsory licensing, there are conditions unique to Brazil which allowed it to achieve the level of success that it did. Firstly, Brazil had at that time, already established a sophisticated indigenous pharmaceutical manufacturing sector and had the means to execute its threat.⁷⁰ The second condition was that Brazil's population,

⁶⁴ May, see note 34 above, 134.

⁶⁵ Ibid, 135.

⁶⁶ Ellen 't Hoen, "TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha" (2002) 3 *Chicago Journal of International Law* 27, 32.

⁶⁷ Peter K Yu, "The International Enclosure Movement" (2007) 82 *Indiana Law Journal* 827, 846.

⁶⁸ Joan Rovira, "Creating and Promoting Domestic Drug Manufacturing Capacities: A Solution for Developing Countries" in Roffe, Tansey and Vivas-Eugui (eds), *Negotiating Health* (2006) 227, 227 - 9.

⁶⁹ Pedro Roffe et al., "From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health" in Roffe, Tansey and Vivas-Eugui (eds), *Negotiating Health* (2006) 9, 15

⁷⁰ Eyal Benvenisti and George W Downs, "Distributive Politics and International Institutions: The Case of Drugs" (2004) 26 *Case Western Reserve Journal of International Law* 21, 44.

unlike other developing nations, comprised of a large affluent middle-class market which many pharmaceutical corporations could not afford to alienate. The combination of these two factors thus heightened Brazil's bargaining position and allowed them to effectively counter their pharmaceutical bullies.⁷¹

South Africa's response: In March 2001, South Africa commenced legal action against a 39-corporation alliance to challenge the justification of intellectual property protection over AIDS medication and the legality of abrogating those rights in light of its nation's dire healthcare crisis.⁷² At trial, the alliance sought to defend its own rights by leading a primary argument of remuneration, which is to say that the high-pricing of the drugs were necessary and justified as it was to recoup the costs associated with the development of the drugs. The next argument raised by the alliance was that the revenue generated from the sale of the medication had a secondary purpose, which was incentivism. The alliance thus alleged that by undermining a pharmaceutical corporation's ability to reap economic reward there would be a drastic decline in subsequent medical research.⁷³ However, as noted by Sarah Boseley, these arguments were a fallacy since evidence suggested that the drugs developed for AIDS treatment was heavily reliant on public funding and charitable contributions.⁷⁴

Pharmaceutical companies, even in the wake of such revelation, have neither compromised nor budged, and the price of AIDS medication still remains high and access remains restricted to those who cannot afford it. Yet the demand for such expensive medication has not fallen in the least, owing to campaigning by such pharmaceutical companies, which claim that generic drugs lack the stringent quality-control systems of its more expensive counterparts and as a result offer less definitive results.⁷⁵ And this fuels the superstitious belief that the "more expensive product, will usually deliver better results", and when it comes to a matter of life and death, few are willing to opt for the purportedly inferior product.

⁷¹ Rovira, see note 68 above, 236.

⁷² May, see note 34 above, 135.

⁷³ Nick Mathiason, "Drugs: Round One to Africa", *Independent on Sunday* (United Kingdom), 11 March 2001, 20.

⁷⁴ Sarah Boseley, "Glaxo Stops Africans Buying Cheap AIDS Drugs", *Guardian* (United Kingdom), 2 December 2000, 25.

⁷⁵ Patricia M Danzon, "The Economics of Parallel Trade", (1998) 13(3) *PharmacoEconomics* 293, 299.

International Response: Following the two case studies discussed above, the international community was finally urged⁷⁶ at the WTO Ministerial Conference in Hong Kong to address the issue of the public health crises in less developed countries.⁷⁷ At the Ministerial Conference, it was decided that the TRIPS agreement would be amended to allow signatories with insufficient pharmaceutical manufacturing capacities to import generic versions of medications.⁷⁸ However many criticised this unprecedented amendment as being brought about by developed nations for their own benefit. This was attributed to the fact that developed nations were also experiencing growing problems associated with the access to medicines.⁷⁹ These concerns were brought about due to the demographic concentration of aging citizens within a developed nation and as such would pose an increasing strain on state healthcare budgeting.⁸⁰ Further, these concerns were exacerbated by the alarming increased instances of the global transmission of deadly flu strains such as Swine flu, Avian flu and SARS.⁸¹ An academic in this new frontier, Peter Yu has remarked that if it were not for the added impetus from developed nations, the issue of access-to-medicines in developing nations might very well have gone unresolved.⁸²

This global consciousness shift, regardless of its underlying motivation never-the-less now recognised the need for cheaper forms of pharmaceutical manufacturing such as the

⁷⁶ Amy Kapczynski, “The Access to Knowledge Mobilization and the New Politics of Intellectual Property” (2008) 117 *The Yale Law Journal* 804, 805 - 8. In her paper, Kapczynski states that this “urging” was a result of what she states to be the Access-to-Knowledge (“A2K”) Mobilisation attributed to the successful campaigning of interests groups advocating the reduction of intellectual property exclusionary rights and conversely accessibility of intellectual goods.

⁷⁷ General Council, Amendment of the TRIPS Agreement, WT/L/641 (8 December 2005) available here: <http://www.wto.org/english/tratop_e/TRIPS_e/wtl641_e.htm> at 29 September 2012.

⁷⁸ World Trade Organisation, *Members OK Amendment to Make Health Flexibility Permanent*, Press Release (6 December 2005) <http://www.wto.org/english/news_e/pres05_e/pr424_e.htm> at 29 September 2012.

⁷⁹ Frederick M Abbott, “The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health” in Roffe, Tansey and Vivas-Eugui (eds), *Negotiating Health* (2006) 27, 27.

⁸⁰ *Ibid*, 29.

⁸¹ Anita Manning, “Are You a Sitting Duck for Bird Flu?” *USA TODAY* (Washington) 7 December 2005, 1.

⁸² Yu, see note 67 above, 831. Yu explains that by allowing the sale of generic drugs, it would make the pharmaceutical market more competitive and lower the prices of medicines uniformly for both developed and developing nations. Also, having more available sources of pharmaceutical manufacturing also allows for greater production capabilities in an instance of a global pandemic.

inclusion of generic forms of medication. Many market analysts predicted that pharmaceutical corporations would reduce prices further to remain competitive given the newfound surge of cheaper generic alternatives. However, contrary to these predictions, pharmaceutical companies, as before, remain undeterred. As noted by Barbara Rosenberg, pharmaceutical corporations then commenced a strategic and covert series of operations to prolong its own market exclusivity and undermine the functionality of generic drug manufacturers. First, pharmaceutical companies commenced legal actions against generic drug manufacturers in order to increase the costs of generics entering the market. Secondly, pharmaceutical corporations modified drug molecules or recombined existing drugs, in minimally different ways, for which new patents could be sought to gain an extension of its term of intellectual property protection. Thirdly, pharmaceutical corporations rushed to trademark brand names, before generic drug manufacturers, in a bid to erect more barriers prior to the entry of the generic drug into the market.⁸³

The blatant refusal by pharmaceutical corporations to reduce prices even in the face of social injustice is clearly an indication of their insatiable desire for financial reward and indifference towards larger social concerns. The reasons for this refusal is observed by Keith Maskus through two key economical factors. First, pharmaceutical corporations fear that by granting concessions to developing nations, it would undermine their ability to maintain high prices in the markets of developed nations.⁸⁴ The effect of granting concessions would reveal the marginal costs of their drug production capabilities. As such pharmaceutical corporations would face mounting pressures in developed markets for lower prices, especially for the supply of medicines to lower-income households. Secondly, pharmaceutical corporations and distributors experience greater profitability in selling low volumes of drugs at high prices rather than higher volumes at lower prices. This is due to the elimination of external costs associated with the transportation of large volumes of stock.⁸⁵ Lastly, for pharmaceutical corporations waging legal war against their generic-drug-manufacturing rivals, it is merely a waiting game. As Timmermans predicts, the grace-period which allows less developed nations to import generic drugs will expire in 2016. At which time the generic drug market is doomed to collapse owing to the lack of market demand.⁸⁶

⁸³ Barbara Rosenberg, "Market Concentration of the Transnational Pharmaceutical Industry and the Generic Industries: Trends on Mergers, Acquisitions, and Other Transactions", in Roffe, Tansey and Vivas-Eugui (eds), *Negotiating Health* (2006) 65, 74 - 5.

⁸⁴ Keith E Maskus, "Ensuring Access to Essential Medicines: Some Economic Considerations" (2002) 20 *Wisconsin International Law Journal* 563 at 567.

⁸⁵ *Ibid*, 566.

⁸⁶ Karin Timmermans, "Ensuring Access to Medicines in 2005 and Beyond" in Roffe, Tansey and Vivas-Eugui (eds), *Negotiating Health* (2006) 41, 44.

PART II - ENCLOSURE OF THE COMMONS

1. The Enclosure Movement in Medieval England

Between the 17th and 19th Century (coinciding with the intellectual property law boom and the Industrial Revolution) there too was another formative legal evolutionary process taking place in England, known simply as “Enclosure”. Though the term has become synonymous with the physical act of fencing off the perimeter of a plot of land, its historical significance cannot however be understated since it has accounted for the modern day understanding of the term “private property”. The enclosure movement has thus become critical in the formation of every individual’s basal right to own, enjoy and freely use the land subject to his ownership; free from the interference and intrusion of others.⁸⁷ In the legal sense of the term, it meant that a designated plot of land was to be converted into “severalty”, and the lawful owner was granted title over that plot. The land was thus severed from any communal rights of ownership or control by the public at large. The legal definition differs from the conventional dictionary meaning of the term “enclosure”, in that an unfenced piece of land could still be held in severalty and a person who crosses the invisible threshold without permission can still be found guilty of trespass. While conversely, a fenced off area might still be a part of the public commons; free for all to enjoy.⁸⁸

The motives behind the formation of enclosuristic laws in relation to land rights, like those of intellectual property, are said to originate from selfish and protectionist ideals.⁸⁹ Jeanette Neeson, for example argues that the enclosure movement was a result of upper-class lobbyists, comprising of nobles and aristocrats, who were already entrenched in influential positions within the ruling British Government or Monarchy. These nobles did so to alter the social structure of rural England, which was predominantly common land left for the usage of commoners.⁹⁰ The commoners, under the quasi-feudal system of the English Monarchy, held proprietary interest over common land through customary rights owing to the fact that

⁸⁷ Roger J P Kain, John Chapman and Richard R Oliver, *The Enclosure of Maps of England and Wales 1595 - 1918* (Cambridge University Press, 2004) 1 - 2.

⁸⁸ Ibid, 1.

⁸⁹ Ibid, 9.

⁹⁰ Jeanette M Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700 – 1820* (Cambridge University Press, 1993) 33.

the land “hath been in use, time out of mind of man”⁹¹ and those rights were then transferrable through familial inheritance.

The nobles, of that time, viewed commoners as a race all unto their own and regarded commoners with a great deal of racist, xenophobic and instinctive distrust.⁹² Furthermore, due to the profound social, economic and educative divide, commoners were often described by the nobles as wild, morally apathetic, lazy and barbaric.⁹³ Nobles also viewed the notion of land-sharing as primitive and economically unviable, since valuable arable land was left untilled and unexploited, and was instead occupied by homeless squatters or used by nomadic farmers for livestock grazing, as was their right to do so under customary law at the time.⁹⁴ To better portray the resentment that the nobles had towards commoners, a quote from the then President of the Board of Agriculture, Sir John Sinclair, is most apt at illustrating such sentiment: “Why should we not attempt a [military] campaign also against our great domestic foe... let us subdue Finchley Common; let us conquer Hounslow Heath; let us compel Epping Forest to submit to the yoke of improvement”.⁹⁵ The extent of the hatred towards commoners, as articulated by Sir John, did not stop short of the annihilation of the commoners by military genocide and it was this fervent disdain for commoners that the nobles lobbied the English Parliament to have those common rights extinguished. The result of this lobbying was famously described by E. P. Thompson in his dismissal of the enclosure movement, as nothing more than a “plain enough case of class robbery”.⁹⁶

Thompson explains that the tainted bias amongst nobles towards the commoners were unwieldy, and in reality a large proportion of common land was engaged in more than just low-yield subsistence farming. Squatters, who were thought to be incorrigible and ill-disciplined, had both sophisticated domestic and intra-village markets, trade channels and had even built permanent dwellings out of stone and mortar, rather than tarps and twigs.⁹⁷

⁹¹ Charles J Jr Reid, “The Seventeenth-Century Revolution in the English Land Law” (1995) 43 *Cleveland State Law Review* 221, 247.

⁹² Agricultural History, *Gazetteer and Directory of the County of Huntingdon* (1854) at 76.

⁹³ George Crabbe, “The Village” Book I, (1783) at line 85, reproduced in Howard Mills (ed), *George Crabbe: Tales, 1812 and Other Selected Poems* (1967), 3.

⁹⁴ Arthur Young (for the Board of Agriculture of Great Britain), *General View of the Agriculture of Oxfordshire* (Neely & Jones Publishing, 1813) 94 -95.

⁹⁵ Sir John Sinclair, *Memoirs of Sir John Sinclair*, II, 111 as quoted in E Halevy, *England in 1815* (1949, 2nd edn) 230.

⁹⁶ E P Thompson, *The Making of the English Working Class* (Gollancz, 1963) 218.

⁹⁷ M Weekly (ed), *Memoirs of Thomas Bewick* (Cresset, 1961) 27.

And yet, the purpose of enforcing enclosurist laws was to simply deny the commoner use of the land; as any occupier who was unable to establish a claim over the land or produce a valid title was evicted swiftly and without compensation. While even those who had a valid right to remain were relegated to infertile terrain, unfit for subsistence, and were still apportioned high rental fees for tenancy.⁹⁸

An example in demonstrating the inequality of land distribution and rent apportionment is evinced from the commons of Barton-on-Humber at the time of conversion into severalty. Of the total 6,000 acres available, 81% of the total land area (4860 acres) was owned by just 10 aristocrats, while the remaining 19% (1140 acres) was allotted to and divided amongst 116 commoners. Furthermore the average rental value of the enclosed arable land tripled from 6 shillings 6 pence to 20 shillings an acre.⁹⁹ By privatising the commons, the nobles effectively caused the redistribution of income from the commons back onto themselves by creating a dizzying upward spiral of increased land and food prices.¹⁰⁰ Firstly, because land became more scarce, competition amongst tenants drove land prices to become unreasonably high. Secondly, by depriving the commoners of land used for gathering, grazing and subsistence farming, it also created a secondary scarcity of food which in turn caused the higher demand for agricultural commodities to exponentially increase arable land values as well.¹⁰¹

The arrogance of the rich aristocracy towards the commoners however left them blinded to the adverse effects enclosure would have on the spatial displacement of the rural population. By making rental practically unaffordable and thereby forcing commoners out of their land, lawmakers neither accounted for nor foresaw the backlash effects. Such as the sudden desertion of the periphery and the subsequent polarisation of ex-field-labourers within the urban city-centre in search of housing and income.¹⁰² And much to the regret of landowners and aristocrats alike, this sudden influx of people into London accounted for over-population, appalling hygiene, epidemic, increased waste and pollution. In their paper, Runge and DeFrancesco found a correlation between the outbreak of the Black Death (the Great Plague of London from 1665 - 1666) and enclosure, which occurred at the peak of British enclosure; at a time when enclosure accounted for about a third of England's total

⁹⁸ Thompson, see note 96 above, 216 - 7.

⁹⁹ R C Russel, *The Enclosure of Barton-on-Humner and Hibaldstow* (Barton Worker's Education Association, 1961).

¹⁰⁰ Robert C Allen, "The Efficiency and Distributional Consequences of Eighteenth Century Enclosures" (1982) 92 *Economic Journal* 937, 951.

¹⁰¹ Runge and DeFrancesco, see note 45 above, 1716.

¹⁰² Thompson, see note 96 above, 223.

land mass.¹⁰³ The nobles also experienced increased poor-dependency through “bounties” (derived from the old English word “boon-ity” – much like modern day welfare grants for the unemployed) established by the Poor Law Commission in the aid of the commoners.¹⁰⁴

However, there are still those that argue that privatisation was necessary to avert Hardin's proposed “tragedy of the commons”. Hardin's *tragedy* predicted social disintegration due to increased competition for the use of common land¹⁰⁵ and environmental degradation due to fierce over-exploitation owing to the fact that each herdsman will try to rear as much cattle as possible on the commons.¹⁰⁶ Defenders of enclosure also argue that by granting ownership of arable agricultural land to wealthy and educated feudal lords, it prevented the land's overuse or underinvestment. It is these perceived (or misconceived) benefits which academics account for the resilience of the medieval English; being able to thrive despite constant warring and widespread epidemic at the close of the 16th Century.¹⁰⁷ However, recent studies by Robert Allen question the true benefit that the enclosure movement actually produced.¹⁰⁸ Allen dispels enclosure and instead argues that the marginalisation of the commoners through increased rents accounted for their diminished bargaining power and allowed the rich aristocratic landlords to amass more wealth. Allen again emphasises the fact that for the general masses, enclosure had little to no beneficial effect and merely redistributed any windfall to the already rich landowners.¹⁰⁹

¹⁰³ Runge and DeFrancesco, see note 45 above, 1714.

¹⁰⁴ Thompson, see note 96 above, 221.

¹⁰⁵ Garrett Hardin, “The Tragedy of the Commons”, (1968) *Science* 1243.

¹⁰⁶ *Ibid*, 1244.

¹⁰⁷ Boyle, see note 48 above, 36.

¹⁰⁸ Allen, see note 100 above, 939.

¹⁰⁹ Robert C Allen, *Enclosure and the Yeoman: The Agricultural Development of the South Midlands 1450 - 1850*, (Clarendon Press, 1994) at 12 - 4.

PART III - THE ENCLOSURE OF THE INTELLECTUAL COMMONS

Modern Interpretations of Enclosure

1. The Second Enclosure Movement

In retrospect, it is clear that the enclosure movement was unjust and had a particularly disastrous effect on a singular segment of society; evident in its causal role attributing to the social upheaval, geographic displacement, and the economic asymmetry between the aristocrats and the commoners in England.¹¹⁰ In comparison, there are uncanny similarities between the on-going propertisation of intellectual products and the medieval English enclosure of common land.¹¹¹ In their fervent desire to achieve absolute control over their property, right-holders are unfairly marginalising consumers¹¹², overcharging them for intellectual goods and unceremoniously forcing users out of the informational commons.¹¹³ The resultant desertion of privatised land by the commoners due to exorbitant rent inflation is also echoed in the practice of modern-day consumers; which is to find cheaper alternatives to obtain intellectual products far beyond their financial means. And in this instance, consumers seek out cheaper and more readily accessible illicit counterfeits or pirated copies instead. The relevance of the study of the historical enclosure movement in today's global intellectual property climate should therefore serve as a cautionary tale for modern intellectual property policy-makers and the lobbyists who incite them; fixated in their relentless pursuit for the privatisation of intellectual goods that was once common property or entirely beyond any prior classification of property altogether.¹¹⁴ Despite the wealth of empirical evidence available against enclosure, there is still a failure to heed those warnings and a dearth of enlightenment in the approach taken by intellectual property proponents.

In today's context, the emergence of privatised informational goods and services as an unequivocally profitable market, brings us back again to yet another critical consideration for the use of economic incentivism and intellectual enclosure as a valid justification for defending intellectual property rights – is the enclosure of the intellectual commons more so

¹¹⁰ Thomas Moore, *Utopia* (Alfred A. Knopf, 1992) 32.

¹¹¹ Hannibal Travis, "Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment" 15 *Berkeley Technological Law Journal* 777, 780.

¹¹² Peter Evans, "The New Commons vs. The Second Enclosure Movement: Comments on an Emerging Agenda for Development Research" (2005) 40(2) *Studies in Comparative International Development* 85, 85 - 6.

¹¹³ *Ibid*, 828.

¹¹⁴ Boyle, see note 48 above, 34.

justified because it has now become an important facet within the global economic market? Boyle's answer to the fundamental query posed above is "no", and he resolves it by again making a comparison between today's enclosure movements and that of England's historical enclosure. During the Napoleonic War (1803 – 1815), the English defended enclosure due to its effectiveness at driving agricultural yields up, not only to feed troops on the domestic front, but also to produce enough agricultural surplus to aid the war effort by generating revenue through surplus crop sales in a starved wartime economy.¹¹⁵ Boyle states that unlike crop production, informational output does not necessarily increase with stricter governmental regulation. Every increase of intellectual protection instead has the effect of erecting additional barriers affecting accessibility. This reduces the ability one has to access the intangible raw material needed for his or her own intellectual outputs.¹¹⁶ Thus according to Boyle, enclosing information from the public domain and subjecting it to exclusive control poses a detrimental to public welfare and social progress; in terms of the informational and educative enrichment of the masses. It is this argument that control-critics firmly stand behind and use to counter the push for stronger intellectual property rights and rebut any economical justifications put forward by lobbyists.¹¹⁷

Sadly however, the current global climate of intellectual property is irrefutably driven by an element of profit. This global obsession with the economic importance of intellectual property is evident in this plain observation: among the world's richest men are the co-founders of the technological giant, Microsoft. For the past century, the world's wealthiest people have always been associated with the physical resource of oil. The title of the "World's Richest" began in the late nineteenth century with John D. Rockefeller and subsequently was subsumed by the Sultan of Brunei in the late twentieth century. Today however it is knowledge workers¹¹⁸ who rank at the top of the world's rich lists: Bill Gates and Paul Allen with their combined wealth of USD\$81.0 Billion.¹¹⁹

¹¹⁵ Boyle, see note 48 above, 43.

¹¹⁶ William M Landes and Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325, 348.

¹¹⁷ Wagner, see note 47 above, at 996 - 7.

¹¹⁸ Lester C Thurow, "Needed: A New System of Intellectual Property Rights" (1997) *Harvard Business Review* 93 at 96.

¹¹⁹ According to Forbes available here: <<http://www.forbes.com/forbes-400/>> at 29 September 2012. Bill Gates is Ranked #1 with \$55 Billion and Paul Allen #20 with \$15 Billion. (Both Gate's and Allen's combined wealth far exceeds Carlos Sim, Mexican telecommunications magnate whom had \$71 Billion in 2011). See also <<http://www.forbes.com/special-report/2012/billionaires-25th-anniversary-timeline.html>> at 29 September 2012.

Given the enviable wealth amassed by today's knowledge workers, it is therefore unsurprising that we now find ourselves in the midst of "the second wave of enclosure".¹²⁰ A term coined by James Boyle to express the current "intellectual property land-grab"¹²¹, or "the enclosure of the intangible commons of the mind"¹²², where public fair use and private intellectual property rights are being reconfigured more and more in the favour of right-holders.¹²³ This continual enclosure of intellectual property is propelled by rich and highly influential corporations engaged in intellectual-property-intensive trade (such as informational, technological and pharmaceutical industries). Further, one must understand that as nations develop and reach maturity, its gross national product becomes increasingly reliant on value-added informational goods and services. There is therefore an inextricable connection between such corporations and its host nation; which have a vested interest in the successful enterprise of corporations reliant on its ability to exploit intellectual property without interference.¹²⁴

2. The Dissimilarities between Real and Intellectual Enclosures

The phenomena of the inappropriate assignment of real proprietary rights onto intellectual goods, is said by Hannibal Travis, to have begun with Blackstonian reasoning.¹²⁵ Blackstone was the foremost jurist that favoured perpetual common law copyright as proposed in his *Commentaries on the Laws of England*.¹²⁶ In it, Blackstone analogised and compared the exclusive rights over real property and that of intellectual property to a simple key. Akin to how a person may duplicate and distribute a set of keys to allow guests to enter his home, an author gives a publisher the right to make copies of his work, and yet the receiver is prohibited by a natural understanding that he may not then forge or sell the key for those

¹²⁰ Runge and DeFrancesco, see note 45 above, 1718.

¹²¹ James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?" (1997) 42 *Duke Law Journal* 87, 94.

¹²² James Boyle, "Fencing Off Ideas: Enclosure and the Disappearance of the Public Domain" (2002) *Daedalus Spring* 13, 17. Herein to be referred to as "Boyle 2".

¹²³ Peter Lyman, "The Article 2B Debate and the Sociology of the Information Age" (1998) 13 *Berkeley Technology Law Journal* 1063, 1075.

¹²⁴ This relationship between corporations and host nations are discussed further below at Part III, 3.

¹²⁵ Travis, see note 111 above, 783.

¹²⁶ William Blackstone, *Commentaries on the Laws of England*, 4 Volumes (Oxford, 1765 - 1769).

uninvited.¹²⁷ Blackstone further states that any attempt by another to take that work without authorisation will amount to an act of theft and an invasion of the right-holder's private property.¹²⁸ Blackstone's definition, however, makes the assumption that all persons implicitly recognise a piece of intellectual work as being as intimate and private as that of a person's home. In reality however, the human psyche does not draw similarities between invasions of privacy and that of intellectual property infringement. Thus the legal barriers that are to be set in place, on a psychological level are ineffective due to the difference of perception between real property and intangible intellectual property.¹²⁹

The dissimilarities between real property rights and those of intellectual property are not merely limited to the notion of personal privacy, but are in fact numerous and profound. By understanding these differences, it will further assist us in understanding whether the imposition of stronger intellectual property laws through enclosures are ever justified.¹³⁰ Firstly, and for proper clarification, the term “commons” encapsulates two very different subject matters, depending of course on its context. Though a commons in relation to land is straightforward, the latter intellectual commons is not so, as it refers to the intangible notion of ideas or creative thought, an ability shared by all humans collectively. Secondly, as mentioned before¹³¹, intellectual property is by its very medium and nature non-rivalrous, unlike common land usage that generally only supports one user and activity at a given time. For example digital format files can be accessed simultaneously, while any intangible thought can be had by any number of persons. Furthermore, Hardin's tragedy¹³² of aggressive competition can thus be easily avoided, as one would not have to worry about the overuse or sustainability of an intellectual commons as opposed to land, which can become

¹²⁷ Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993), 77. Note, Rose quotes Lord Blackstone in *Tonsin v Collins* (1761) 98 Eng. Rep. 181 (K.B.).

¹²⁸ Blackstone, see note 126 above, Volume 2, 405 - 6.

¹²⁹ Tom R Tyler, “Compliance with Intellectual Property Laws: A Psychological Perspective” (1997) 29 *New York University Journal of International Law and Politics* 219, 220 - 1.

¹³⁰ Boyle, see note 48 above, 41.

¹³¹ Please see note 31 above: The fact that intellectual property is “non-rivalrous”, is used by Moore as a contradictory means to justify the granting of intellectual property right-holder's exclusive rights over their protected works since no-one is to be left worse-off through deprivation. In this instance, the fact that intellectual property is non-rivalrous is contrasted with Hardin's Tragedy to mean that intellectual resource can never be depleted and should therefore should be free to use. The fact that intellectual property therefore is “non-rivalrous” is used by different academics, often with contradictory perspectives either justifying or criticising a right-holder's ownership over intellectual property.

¹³² Hardin, see note 105 above for more information on Hardin's Tragedy of the Commons.

barren from repeated use. The fact that an intellectual good is by nature and medium non-rivalrous also poses a problem for right-holders enforcing their exclusionary rights. For example, a single digital file can be replicated an infinite number of times, and could therefore potentially satisfy an infinite number of consumers at virtually no cost.¹³³ Which brings us to the third point, unlike common land, the intellectual commons is perceived to be non-exclusionary. This perception is further exacerbated and perpetuated by the advent of technology and the ease with which digital files can be uploaded, downloaded, printed, copied, pasted, converted, “burned”, saved and sent.

The fact that intellectual goods are non-rival and non-excludable has become the basal argument underlying the pro-intellectual property rights maxim employed by lobbyists. Such lobbyists argue that with every instance of cost depreciation in relation to the copying or transmission of informational goods, so too should the level of intellectual property protection increase in response. In that sense lobbyists argue that equilibrium must be maintained, and Boyle points out that this trend, to achieve absolute and perfect proprietary control over intellectual goods as copying costs approach a zero-minimum, has been clearly evident throughout the history of intellectual property.¹³⁴ Tracing back to the roots of intellectual property history, Boyle has identified three milestones that have greatly reduced the exclusionary nature of informational goods and has also identified the corresponding regulatory response. (1) Physical copying gave rise to a need to control the tangible replica. (2) The Gutenberg printing press spawned the birth of intellectual property rights through the Statute of Anne.¹³⁵ (3) While the Internet, and the perceived disastrous impact that it could have on informational goods, caused the United States to enact the Digital Millennium Copyright Act, the No Electronic Theft Act, the Sonny Bono Term Act and the Collections of Informational Anti-piracy Act.¹³⁶

All of the incremental legislative measures stated above serve to proprietise and enclose intellectual goods in two main methods. Firstly, by extending the duration of protection (either over a patented process or a copyrighted work), the effect of which extends the

¹³³ Boyle, see note 48 above, 41.

¹³⁴ Ibid, 42.

¹³⁵ Statute of Anne 1710, 8 Anne, C.19: an English statute which conferred exclusive rights upon the author of books not yet published for a term of 14 years and with a further renewal term of another 14 years provided the author was still alive at the expiry of the first term of protection (effectively making the protection term a full 28 years). Books already in print were also granted a single 21 year term of protection. For more information see: R Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain, 1695 - 1775* (Hart Publishing, 2004).

¹³⁶ Boyle, see note 48 above, 42.

exclusionary period the process or work has from becoming part of the public domain. The second method employed by existing right-holders/lobbyists would be to expand the actual scope or classification of intellectual property. This alters the requisite conditions necessary for a process or work to be eligible for protection, making it less onerous, and in effect means that more and more processes and works can be protected and excluded from the public domain.¹³⁷

An example of modern enclosure through an extension of the scope of proprietary classification would be the broadening of patent rights to include human genetic material. Predictably, proponents for the enclosure of the human genome then chimed in unison that by doing so, it would guarantee investors the certainty of subsequent rights of exploitation. And owing to that certainty, it would allow for the inward flow of financial investment and lead to medical breakthroughs in the form of novel drug and gene therapies.¹³⁸ In that sense, the appropriation of proprietary rights over genetic material would seem a noble endeavour, to spur medical progress and give due credit to the mantra that “property saves life”.¹³⁹ However, looking again at the case study of the AIDS pandemic. In relation to the field of medical development; initial innovate enthusiasm is often abrogated by capitalistic greed¹⁴⁰, and the subsequent fruits of the medical research will be rendered unobtainable to those who need it most. Opponents also argue against the enclosure of the human genome on an ethical basis, claiming that all human genetic material forms a part of the collective heritage of humankind, and should by right remain common to all. The conversion of the human genome into intellectual property was thus seen as a gross invasion of individualism and privacy since it challenged the universal assumption that a person is master over himself and his body.¹⁴¹ This highlights another key difference between that of intellectual and real property, as intellectual property penetrates further into the realm of scientific human self-discovery, it raises ethical issues that were never previously a cause of concern with inanimate real property.

¹³⁷ Travis, see note 111 above, 808.

¹³⁸ Alexander K Haas, “The Wellcome Trust’s Disclosures of Gene Sequence Data into the Public Domain and the Potential for Proprietary Rights in the Human Genome” (2001) 16 *Berkeley Technology Law Journal* 145, 145 - 7.

¹³⁹ William A Haseltine, “The Case for Gene Patents”, (2000) *Technology Review* (published by MIT) <<http://www.technologyreview.com/featured-story/400781/the-case-for-gene-patents/>> at 29 September 2012.

¹⁴⁰ Boseley, see note 74 above. Sarah Boseley states that the legal justifications which pharmaceutical corporations sought to use were in fact a fallacy.

¹⁴¹ Margaret J Radin, *Contested Commodities* (Harvard University Press, 1st Ed, 1996) 137 - 41.

3. Modern Aristocrats: Who Does the Enclosing?

In the modern context of intellectual enclosure, who are the aristocrats in today's modern intellectual land grab? By resolving this query, it will allow for a better understanding of how these modern aristocrats' agendas have shaped today's intellectual property climate. As alluded previously, the creation and continued strengthening of intellectual property rights are predominantly driven by market concerns. Also, "intellectual property right-holders" are the main beneficiaries of intellectual property exploitation and therefore place express emphasis on the economic criteria and the remunerative nature of enclosure above any other concerns of public welfare or social progress.¹⁴² To reiterate, the "lobbyists" or "intellectual property proponents" of such market concerns are corporations that seek to commodify as much intellectual goods as possible.¹⁴³ As Marian Miller observed, corporations are held accountable by shareholders to produce dividends, and it is this internal mechanism of capitalistic dynamism which fuels their insatiable drive to privatise informational resources, processes and markets.¹⁴⁴ Enclosure, according to Miller, is a symptom caused by the deepening of corporate capitalism and its continual penetration into areas of daily life and social interactions, done so in the hopes of gaining a competitive edge in today's competitive economic environment.¹⁴⁵

Corporations, much like their medieval aristocratic counterparts employ similar tactics in achieving the propertisation of the informational commons. Corporations manipulate domestic governments to enact favourable local intellectual property laws by using their dominant bargaining position. A position which is as a result of a nation's economic reliance on large corporations for investment, job creation and economic stimulation. This allows for a symbiotic relationship to be established between a corporation and its host nation¹⁴⁶, and this relationship is based on the promissory trade-off that a host nation will do its utmost to legally protect and enforce the corporation's intellectual property rights, so long as the

¹⁴² Anthony McCann, "Enclosure Without and Within the 'Information Commons'" (2005) 14 *Information and Communications Technology Law* 217, 235.

¹⁴³ Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System* (Basic Books, 2004) 67.

¹⁴⁴ Marian A L Miller, "Tragedy for the Commons: The Enclosure and Commodification of Knowledge" in Dimitris Stevis and Valerie J Assetto (eds), *The International Political Economy of the Environment: Critical Perspectives* (2001) 111, 113.

¹⁴⁵ Ibid, 113 - 4.

¹⁴⁶ Ian M Langella, Jerry Carbo and Viet Dao, "An Examination of the Symbiosis between Corporations and Society with Lessons for Management, Education and Practice" (2012) 6 *Global Virtue Ethics Review* 51, 51 - 3.

corporation passes on a significant amount of its financial benefit onto its host. In that sense developed nations are the next greatest stakeholders in the global technological and informational market and also stand to lose a great amount of revenue with the continual decline of transmission and copying costs.¹⁴⁷ Though it is the national governments that are the ones who enact the laws which ultimately cause the enclosure of the informational commons, they do so at the behest, manipulation and even coercion of powerful conglomerates.¹⁴⁸ This power, the ability to create and amend international intellectual property laws, has been said by independent academics like Vaitos to have now shifted from once powerful state-authoritarian control to large multi-national corporations.¹⁴⁹

Stephen Barley proffers that corporations manipulate the global politics of intellectual property because by their nature, corporations are abhorrent to change and are more inclined towards moulding their environments rather than being moulded by it.¹⁵⁰ There are several key mechanisms which corporations utilise to mould their environments. First, corporations have strong public relations and advertising campaigns, which they use to legitimise their actions and gain public support. The second mechanism is “lobbying”, a term first used in England in the 17th Century to describe the process where non-members of the British government would argue their case in the “entry hall in the British House of Commons” (or the “lobby”).¹⁵¹ The modern expression of the term has essentially remained the same, except for the underlying implication of corruption that now permeates the term’s usage; stemming from the fact that it is now seen as the process for which money is exchanged for political favours.¹⁵²

¹⁴⁷ Susan K Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (Cambridge University Press, 2003) 12.

¹⁴⁸ Vaidhyanathan, see note 143 above, 69.

¹⁴⁹ Constantine Vaitos, “Patents Revisited: Their Function in Developing Countries” in Science, Technology and Development: The Political Economy of Technical ADvance in Cooper Charles (ed), *Underdeveloped Countries* (1973) 71, 72 - 3.

¹⁵⁰ Stephen R Barley, “Building an Institutional Field to Corral a Government: A Case to Set an Agenda for Organisation Studies” (2010) 31 *Organisation Studies* 777, 777.

¹⁵¹ Frank R Baumgartner and Beth L Leech, *Basic Interests: The Importance of Groups in Politics and in Political Science* (Princeton University Press, 1998) 33.

¹⁵² Barley, see note 148 above, 781. According to Barley, this novel association with the term “lobbying” and the payment of money in exchange for political favours, arose after the formation of American Political Parties in 1824.

At the forefront of such criticisms is America, which is said to be highly susceptible to manipulation by large corporations.¹⁵³ The reason being that America is home to many technological, pharmaceutical and informational Goliaths, which also have far-reaching transnational affluence and clout. The influence of such corporations on American legislators and judges are evident from the trend of domestic reforms, which contributed to the upward strengthening of patent and copyright protection laws within America in the last two decades.¹⁵⁴ The extent of the influence that corporations had on the American government was exemplified with the passing of the Tillman Act in 1907¹⁵⁵, which was aimed at quelling public outrage over exorbitant “campaign contributions” which corporations poured into backing Presidential candidates. The cause for such public outrage stemmed from public sentiment, which reflected that this practice undermined the ideals of the “American-democratic-process” and the people were also unconvinced that their leaders would be able to remain neutral given the potential President’s conflict of interests; which was to repay corporate-backers with political favouritism in lieu of large campaign funding. The Tillman Act however was never stringently enforced and corporate entities continue to influence American federal policies through a multitude of ways, from funding political aspirants to lobbying politicians through trade associations and even resorting to full-fledged threats of withdrawing direct investment in development schemes.¹⁵⁶

Today, American politics is greatly influenced by the presence of Political Action Committees or “PACs”¹⁵⁷, which are essentially non-profit organisations set-up and directed by corporations.¹⁵⁸ The purpose of a PAC is to choose and then subsequently support viable

¹⁵³ Keith E Maskus, *Reforming U.S. Patent Policy: Getting the Incentives Right* (Council on Foreign Relations, 2006) 3.

¹⁵⁴ Nancy T Gallini, “The Economics of Patents: Lessons from Recent United States Patent Reform” (2002) 16(2) *Journal of Economic Perspectives* 131, 131.

¹⁵⁵ The Tillman Act of 1907 (34 Stat. 364) (January 26, 1907) - Following the 1904 Presidential Elections, President Theodore Roosevelt was charged for accepting corporate contributions to his campaign. In response, President Roosevelt called for the prohibition of further corporate campaign contributions and in 1906, Senator Benjamin Tillman of South Carolina sponsored a bill to criminalise any of such corporate campaign contributions. For more information please refer to: Asghar Zardkoohi, “On the Political Participation of the Firm in the Electoral Process” (1985) 51(3) *Southern Economic Journal* 804.

¹⁵⁶ Barley, see note 150 above, 781.

¹⁵⁷ Ibid, 785.

¹⁵⁸ Larry J Sabato, *PAC Power: Inside the World of Political Action Committees* (W.W. Norton, 1984) 48. Note also that, though a PACs formation is also a combination of other trade associations, citizen groups and individuals, they however have very little say in the direction as to which political candidate the PAC chooses to support. This is due to the fact that the Committee appointed as the directing body of the PAC is elected and chosen by the Corporation’s CEO.

political candidates, whose policies are agreeable to the interests of the PAC's founding corporation. After which, the PAC will offer campaign contributions and further the chosen candidate's political convictions through wide-reaching mediums, such as television, radio and newspaper advertisements.¹⁵⁹ Also, as Golden discovered from her investigations, corporations accounted for more than 67% of all information relied upon for the decision-making processes adopted by US regulatory agencies. The remaining 33% consisted of comments made by citizen groups, unions and other governmental agency groups (which were the second highest contributors).¹⁶⁰ This led Golden to remark that this was due to two inherent aspects of corporations: (1) the superior organisational skills that corporations had in comparison to other smaller interest groups and (2) the strong informational networks available to corporations.¹⁶¹

Under the current provisions of the law, Corporations are recognised as artificial beings and are granted the same legal rights as any natural individual.¹⁶² As exemplified above however, Corporations have the ability to amass and efficiently organise vast pools of financial wealth and manpower, far greater than any natural person ever could. In the realm of intellectual property law, this is problematic because a corporation is granted the same control rights as an independent creator and yet both have differing limitations in their respective abilities to enforce those rights.¹⁶³ And in reality, the law thus creates an often overlooked social injustice. Christopher May argues that this inequality should be corrected through a re-consideration of the current legal priorities between artificial and natural persons and that the classification of both under the law should not be one-and-the-same given the vast differences between the two.¹⁶⁴

For example, a survey conducted by the American Intellectual Property Law Association, found that the average litigation costs to defend against a patent infringement suit ranged from a jaw-dropping USD\$650,000 to USD\$5 million depending on the amount of damages

¹⁵⁹ Barley, see note 150, 785.

¹⁶⁰ Marissa M Golden, "Interest Groups in the Rule Making Process: Who Participates? Whose Voices Get Heard?", (1998) 8(2) *Journal of Public Administration Research and Theory* 245, 247 - 51.

¹⁶¹ Ibid, 255.

¹⁶² Tomas Lipinski and Johannes Britz, "Rethinking the Ownership of Information in the 21st Century: Ethical Implications", (2000) 2(1) *Ethics and Information Technology* 49, 66.

¹⁶³ May, see note 34 above, 142.

¹⁶⁴ Ibid, 142 - 3.

sought by the plaintiff.¹⁶⁵ In that regard, it is unfair given that a corporation would be able to defend itself against an expensive lawsuit, while an individual would not. The second problem that this unfairness creates would be the ability of a corporation to access information, which is not uniformly applicable to a natural individual either.¹⁶⁶ An example of which would be a corporation's ability to afford expensive technological licenses, which was a USD\$22 billion industry in and of itself in 2008.¹⁶⁷ The culmination of both inequalities are effectively stomping out weaker independent creators; since they are unable to legally acquire the technology necessary to compete with other technological giants. Independent creators often do not even dare contemplate using such technologies on the sly, as simply defending a patent infringement suit can be financially ruinous.¹⁶⁸ To cite Lawrence Lessig, the effect of this combination of issues has therefore led to the deterioration of intellectual property to the point where protection merely means having the sufficient finances "to hire a lawyer to defend your right to create".¹⁶⁹

Next, Stephen Barley also states that it is logical to expect that the level of corporate influence is not merely confined to domestic governments and has corporations also have the ability to affect regional (e.g. the European Union) and even international institutions (like the WTO, WIPO and the UN).¹⁷⁰ The reasons for why corporations seek stronger global protection over intellectual property is self-explanatory. Since having an internationally uniform regime grants uniform enforceability of rights and allows corporate right holders to deepen their control over the domestic regulatory environment in any nation.¹⁷¹ Corporations manipulate global policies through their host-nations, which act as their political mouthpiece within international forums.

¹⁶⁵ Jim Kersetter, "How Much is that Patent Lawsuit going to cost you?" CNET News.com (2012) <http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/> at 11 October 2012. For a detailed breakdown of the costs for the defendant: if the claim is up to (USD) \$1 mil., legal fees will cost up to \$650,000; if the claim is for \$1 mil. to \$25 mil., legal fees cost up to \$2.5 mil.; and if the claim is upwards of \$25 mil., then the legal fees will cost \$5 mil.

¹⁶⁶ May, see note 34 above, 142 - 3.

¹⁶⁷ The World Bank, *Global Economic Prospects: Technology Diffusion in the Developing World* (2008) 61 and also 138.

¹⁶⁸ Kersetter, see note 165 above.

¹⁶⁹ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin, 2004) 187. Herein to be referred as "Lessig 2".

¹⁷⁰ Barley, see note 150, 798.

¹⁷¹ Sell, see note 147, 13.

An example of which would be the 1990 incident between Chile and the Pharmaceutical Manufacturers of America (or “PMA”).¹⁷² During which time, Chile was struggling to resist diplomatic pressure from America which was pushing for Chile to reform domestic intellectual property laws and in turn grant legislative patent protection over the alliance’s pharmaceutical products. Chile resisted so as to prevent the inflation of domestic medicine prices, which would ensue once PMA was granted a localised monopoly over medicines manufactured within Chilean borders. In 1991 however, under the mounting pressure, Chilean law-makers offered a compromise and finally agreed to grant PMA’s medicines a 15 year protection scheme, rather than remaining resolute on its initial stance which called for the absolute rejection of PMA’s demands for patent protection.¹⁷³ The historical significance of this international incident is said by Susan Sell to be the starting point for the subsequent establishment of the TRIPS Agreement as a valid source of public international law in 1994.¹⁷⁴ Sell states that the TRIPS agreement enshrines the right-holder-biased protectionism left in the residual wake of the Anglo-American intellectual property model. This is because the TRIPS agreement was crafted by an *ad hoc* alliance of 12 members, consisting of American corporations and their counterparts from Europe and Japan.¹⁷⁵

The effect of the TRIPS agreement has institutionalised the metaphorical relationship linking intellectual goods to real property and supports the commodification of knowledge. The TRIPS agreement has also extended the scope of intellectual property by introducing new forms of protectable information such as micro-organisms and micro-chip architecture.¹⁷⁶ Furthermore, the TRIPS agreement has deep-reaching regulatory consequences for all participating nations (whether developed or developing¹⁷⁷) as it seeks to formally harmonise the intellectual property regimes of all its signatories through the importation of public

¹⁷² Sell, see note 147 above, 1.

¹⁷³ Ibid.

¹⁷⁴ Ibid, 2 - 3.

¹⁷⁵ The members of the 12 member alliance known as the Intellectual Property Committee were Bristol-Meyers, CBS, Du Pont, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto and Pfizer.

¹⁷⁶ May, see note 34 above, 123.

¹⁷⁷ The uniform application of the TRIPS Agreement as a “one-size-fits-all” intellectual property regime has little consideration for the differences inherent in industrialised developing nations and developing nations. This has many ill side effects for developing nations at the time of implementation ranging from high implementation costs and structural deficiencies, to stifling a developing nations growth since it prevents industry growth through imitation - which is the necessary freedom of enterprise needed for such nations to catch-up to the rest of the developed world - for more information on the criticisms against TRIPS. Please note that this issue is also discussed in Part III, 4.

international law into domestic law.¹⁷⁸ Therefore as Sell aptly observes, the implementation and causative role played by private interests groups in the creation of the TRIPS agreement was monumental and a profound show of global power by corporate conglomerates.¹⁷⁹

4. The Enclosure of International Policy Space

In his paper titled “The International Enclosure Movement”, Peter Yu cautions commentators and policy makers not to be excessively focused on the concerns related to the enclosure of the public intellectual domain. He instead insists that the global politics underlying intellectual property must be as equally scrutinised. Yu also offers his own novel interpretation of the modern enclosure movement of international policy space as one such alternative academic study. The significance of this novel approach to the study of intellectual enclosure stems from the fact that modern intellectual property laws are implemented at an international level and has a trickle-down effect. Making its way into localised legal systems, either through wholesale adoption or through legislative rewording.¹⁸⁰ This practice, if not properly critiqued, according to Yu “will not only take away the policy space individual countries have in their attempts to respond to problems within their borders, but also limit their abilities to independently resist and respond to the enclosure of the public domain”.¹⁸¹

This newer formulation of international enclosure movement, unlike previous interpretations, does not involve the privatisation of intellectual commons, or what information was free for all to use. It instead concerns the enclosure of “attractive policy options for less developed countries”.¹⁸² To put this notion plainly, the enclosure of policy space envisions the reduction of political space that nations require to “manoeuvre” and make independent decisions concerning its own state affairs. And in the case of intellectual property, the proliferation of bilateral and regional trade agreements, and the implementation of TRIPS as a restrictive set of basal intellectual property protection standards has attributed to the “fencing off” and shrinkage of such policy space. This in effect has especially denied less developed nations the use of their own discretionary powers and autonomy in matters that concern the flexibility of domestic intellectual property systems. Especially for a less

¹⁷⁸ Christopher May, *The global political economy of intellectual property rights: the new enclosures* (Routledge, 2nd Ed, 2010) 3 - 6.

¹⁷⁹ Sell, see note 147, 2.

¹⁸⁰ Yu, see note 67 above, 902.

¹⁸¹ Ibid, 906.

¹⁸² Ibid, 828.

developed nation to enact laws which would best cater and give due deference to the respective nation's social, economic, cultural and technological conditions.

Less developed nations are particularly disadvantaged and are especially susceptible to the enclosure of their own policy space due to their reduced bargaining position at the international level.¹⁸³ And also due to the emergent neo-liberal trends and practices of developed nations¹⁸⁴; which seeks the harmonisation of intellectual property laws and thereby promote uniformity of protection over its own exported goods. This push for the process of harmonisation has been predominantly led by America and members of the European Union (where corporate lobbying is at its strongest¹⁸⁵) and has transformed the myriad number of domestic patchwork and piecemeal¹⁸⁶ systems of intellectual property into a global "supranational code" that imposes fixed obligations on all members under this new unified system.¹⁸⁷ It is because of this profound power disparity between American and European states as opposed to the rest of the world, that has led to this process of harmonisation being often referred to as the process of "Westernisation" of intellectual property regimes.¹⁸⁸

Proponents that support the implementation of western models of intellectual property rights onto less developed nations argue that the introduction of intellectual property protection is essential for the inward flow of foreign direct investment.¹⁸⁹ And with the inward flow of investment, it too brings with it consequential and horizontal benefits of technological transfer and acts more importantly as a stimulus for industrial development and domestic economic growth.¹⁹⁰ This inward flow of investment is directly attributed to the new-found

¹⁸³ Peter Drahos, "Developing Countries and International Intellectual Property Standard-Setting" (2002) 5(5) *The Journal of World Intellectual Property* 765, 773 - 4.

¹⁸⁴ Kurt Burch, "Intellectual Property Rights and the Culture of Global Liberalism" (1995) 17(2) *Science Communication* 216, 216 - 7.

¹⁸⁵ Yu, see note 67 above, at 906.

¹⁸⁶ Paul Edward Geller, "From Patchwork to Network: Strategies for International Intellectual Property in Flux", (1998) 9 *Duke Journal of Competition and International Law* 69 at 72.

¹⁸⁷ Jane C Ginsburg, "International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code?", (2000) 47 *Journal of the Copyright Society of the United States of America* 265 at 265 - 267.

¹⁸⁸ Yu, see note 67 above, at 902.

¹⁸⁹ Michael P Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institution Press, 1998) 12 - 5.

¹⁹⁰ Yu, see note 67 above, 892 - 4.

certainty and confidence that intellectual property guarantees, since right-holders will be able to enforce their intellectual property rights against counterfeiters and seek legal compensation for any infringement of those rights.¹⁹¹ Because of this, trade negotiators often seek to minimise financial risks associated with piracy and counterfeiting¹⁹² when bringing its technological goods to a developing nation which offers more competitive manufacturing capabilities as a result of its cheaper unskilled workforce. This risk-minimising practice is done by bundling intellectual property protection provisions with enticing trade deals. Less developed nations, eager to experience the advantageous effects that investment brings, often do not hesitate to adopt such onerous intellectual property provisions and in the process neglect to address the imbalance that such terms create in relation to its own innovative capabilities.¹⁹³ The seemingly advantageous inward flow of investment, associated with the imposition of Western patent systems, however, are actually more costly than beneficial for a less developed nation.¹⁹⁴ This is because a vast amount of resources are required to be diverted to set in place infrastructure for the policing of domestic industries for intellectual property infringements.¹⁹⁵ This expenditure depletes a less developed nation's scarce resources, money and manpower, that would have been better used in other forms of infrastructural development.¹⁹⁶ However in reality, for less developed nations there is no real choice in the matter, since becoming a TRIPS signatory has now become a prerequisite condition for a nation's entry to the WTO.¹⁹⁷ Therefore less developed nations are effectively coerced into the adoption of the basal intellectual property protection obligations set out in

¹⁹¹ Robert Bird and Daniel R Cahoy, "The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach" (2008) 45(2) *American Business Law Journal* 1, 3 - 5.

¹⁹² Michael L Doane, "TRIPS and International Intellectual Property Protection in an Age of Advancing Technology" (1994) 9 *American University Journal of International Law and Policy* 465, 469 - 70.

¹⁹³ Carlos M Correa, "Internationalisation of the Patent System and New Technologies", (2002) 20 *Wisconsin International Law Journal* 523, 524.

¹⁹⁴ The Economist, *Imitation v Inspiration: How poor countries can avoid the wrongs of intellectual property rights*, (2002) <<http://www.economist.com/node/1325360>> at September 2012.

¹⁹⁵ Sean A Pager, "Patents on a Shoestring: Making Patent Protection Work for Developing Countries" (2007) 23 *Michigan State University Law Review* 755, 757.

¹⁹⁶ Michael W Carroll, "One for All: The Problem of Uniformity of Cost in Intellectual Property Law" (2006) 44 *American University Law Review* 845, 853.

¹⁹⁷ Peter K Yu, "Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists" (2002) 70 *University of Cincinnati Law Review* 569, 580.

the TRIPS agreement. The alternative to that would be to face total exclusion from the global trade market, which in reality is never an option.¹⁹⁸

The implementation of the TRIPS agreement is seen as the main mechanism which leads to the enclosure and reduction of a nation's policy space and it does so through several significant ways. Firstly, the TRIPS agreement created non-discriminatory patent rights over all fields of technology¹⁹⁹ and includes any invention be it a product or process.²⁰⁰ This requirement to extend patent rights over all areas of technology thus diminishes a nation's ability to effectively choose which of its technological industries it should protect or not. For example, fledgling industries are more likely to flourish in an absence of protection and instead requires free enterprise which gives leeway to certain forms of intellectual property infringement. Since in reality it is necessary for a nation to enforce a wide spectrum of varying levels of protection in varying fields.²⁰¹ As in the field of pharmaceuticals manufacturing, the production of generic drugs would allow for more effective mass utilisation of medicines and also place less burdens on a nation's healthcare system since the pricing of medical goods and process are not subject to monopolistic price control mechanisms.²⁰²

Second, the TRIPS agreement further limits the power of local governments from issuing a compulsory license. This was done through the inclusion of TRIPS Article 31(b), which is essentially a set of complex procedural rights, legal prerequisites and exceptions establishing the circumstances for when a compulsory license may or may not be issued against an intellectual property right-holder.²⁰³ For example a signatory may not issue a compulsory license unless it "has made efforts to obtain authorisation from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a

¹⁹⁸ Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting* (Study Paper 8, Commission on Intellectual Property Rights, 2002) 35. In his paper, Drahos described coercion as being a "web" since there are numerous methods, subtle (including extraneous clauses in TRIPS+ Agreements or Free-Trade-Agreements) and direct (threat of embargo), which the international community (predominantly America and Europe) employs to force less developed nations into becoming TRIPS signatories.

¹⁹⁹ Roffe, see note 69 above, 9.

²⁰⁰ Please refer to Article 27 of the TRIPS Agreement.

²⁰¹ Peter K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the 21st Century" (2000) 50 *The American University Law Review* 131, 233.

²⁰² Yu, see note 67 above, 860.

²⁰³ Roffe, *Supra* note 69, 9.

reasonable period of time”.²⁰⁴ Signatories can forego this requirement if compulsory licensing is necessary to address state crisis and where the usage of the patent is for non-commercial domestic usage only. The usage of patents acquired in such instances of state emergency however must cease when the urgent circumstances are abated and at which time the local state government is to pay “adequate remuneration... taking into account the economic value of the authorisation [for the use of the patent]”.²⁰⁵ The inclusion of Article 31 was consequential from the success of Brazil and the subsequent lobbying of pharmaceutical corporations to reduce the ability of state governments from using coercive economic threats to ensure discounts over medicines. The resultant inclusion of Article 31, on its face, therefore diminishes the discretionary powers that state governments have concerning the issuance of compulsory licenses, which was a necessary bargaining chip for governments to protect themselves from pharmaceutical bullying. In today’s post-TRIPS environment however that is no longer the case and the use of compulsory licenses must always be compliant with a right-holder’s ultimate prerogative to reap financial reward.²⁰⁶

Thirdly, the TRIPS agreement stipulates that all intellectual property disputes arising under the agreement must be settled via the WTO’s Dispute Settlement Body.²⁰⁷ This mandatory arbitration process therefore removes a nation’s ability to effectively settle its own disputes internally and instead transfers the process into the hands of a third-party. A third-party which is often criticised for its positivistic approach towards the enforcement of the law, favouring the absolute enforcement of international intellectual property laws rather than considering the actual social or economic ramifications that such laws might impose onto a nation.²⁰⁸

Peter Yu further explains how the three examples listed above has attributed to the plight that less developed nations experience with the implementation of the TRIPS agreement. Yu proffers that the TRIPS agreement was “designed with a focus on setting only the floor, rather than the ceiling, of protection”.²⁰⁹ Which means to say that the agreement merely focuses on the minimum standards of intellectual property protection and not the maximum

²⁰⁴ Please refer to Article 31(b) of the TRIPS Agreement.

²⁰⁵ Please refer to Article 31(h) of the TRIPS Agreement.

²⁰⁶ Yu, see note 67 above, 861 - 2.

²⁰⁷ Please refer to Article 64 of the TRIPS Agreement.

²⁰⁸ Benvenisti and Downs, see note 60 above, 21.

²⁰⁹ Yu, see note 67 above, 902.

level of restriction that may be imposed.²¹⁰ What this perpetuates therefore is a limitless level of intellectual protection, which would overtime be subject to incremental strengthening and cease only once absolute control has been achieved.²¹¹ This is explicitly stated in Article 1 of the TRIPS agreement which states that “members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement”.²¹²

This misguided focus, according to Yu, produces two negative effects for the global intellectual property regime. (1) This base-oriented approach only allows for the strengthening of intellectual property laws but never its weakening. And (2) to quote Yu, “[the TRIPS Agreement] has made it difficult for countries to take a holistic perspective and offer package legislation that includes strengthened protection and public interest offsets, especially when the rules are scrutinised by the WTO dispute settlement panels”.²¹³ This supports the notion that the WTO dispute settlement panel operates merely as a “one-way ratchet”.²¹⁴ Meaning to say that any complaints to the dispute panel can lead to the rescission of domestic laws that reduce the level of intellectual property protection, but fail to address any laws which might unreasonably increase protection. It is this positivistic approach which has led Dreyfuss and Dinwoodie to incisively comment that disputes “will always unravel in the same direction, requiring nations to change those features of their legislation that benefit user groups while protection-enhancing provisions stay in place”.²¹⁵

A practical example of which would be the striking down of the Fairness in Music Licensing Act²¹⁶ which waived the requirement for a public performance license to be necessary for bars, restaurants, retail stores and other small business boutiques that wished to play protected music within its premises. Yet the companion legislation (the “Sonny Bono Act” 1998) under the same package deal was left untouched and accounted for the extension of

²¹⁰ Laurence R Helfer, “Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking” (2004) 29 *Yale Journal of International Law* 1, 58 - 9.

²¹¹ Peter K Yu, “TRIPS and its Discontents” (2006) 10 *Macquarie Intellectual Property Law Review* 369, 402.

²¹² Please refer to Article 1 of the TRIPS Agreement.

²¹³ Yu, see note 67 above, 855.

²¹⁴ Grame B. Dinwoodie and Rochelle C Dreyfuss, “TRIPS and the Dynamics of Intellectual Property Lawmaking”, (2004) 36 *Case Western Reserve Journal of International Law* 95, 99 - 100.

²¹⁵ Dinwoodie and Dreyfuss, see note 214 above, 99 - 100.

²¹⁶ *Fairness in Music Licensing Act* 1998 17 USC § 110.

copyright terms.²¹⁷ Dreyfuss and Dinwoodie further caution that if this unfair bias is not addressed then it might allow for the perverse practice of encouraging right-holders to initially agree to protection reductions as part of legislative package deals. Given that such packages might later be successfully challenged at the WTO dispute resolution panel and still allow right-holders to experience the residual benefits granted through the surviving legislation.²¹⁸

Though Yu does not support the global harmonisation of intellectual property laws, he does not call for total disharmony either. And even acknowledges that in some instances contextualised policy space enclosure can even be beneficial; that is to say that the nation's unique local conditions are not ignored as a result of the eminent enclosure.²¹⁹ To further emphasise how much international policy space has shrunk in the wake of the TRIPS agreement, Yu nostalgically recalls the period when global intellectual property law was governed under the Paris Convention.²²⁰ During the late 1960s, many countries had misgivings and conflicts over issues of compulsory licenses, parallel importation, working requirements and schematic filing systems.²²¹ Many countries also had ideological differences in opinion concerning the concept of intellectual property, for example neither Switzerland nor the Netherlands had any recognisable form of patent systems²²² and even Germany was highly abhorrent to the idea of patent laws.²²³ As a suitable compromise therefore, the Paris Convention favoured an anti-discriminatory stance towards each individual member's level of patent protection.²²⁴ This thus left considerable policy space in which member nations could explore the optimal level of localised patent protection. This allowed for member nations to make either incremental or reductive adjustments to their

²¹⁷ Dinwoodie and Dreyfuss, see note 214 above, 99.

²¹⁸ Peter M Gerhart, "Introduction: The Triangulation of International Intellectual Property Law: Cooperation, Power and Normative Welfare" (2004) 36 *Western Reserve Journal of International Law* 1, 16.

²¹⁹ Yu, see note 67 above, 906 - 7.

²²⁰ *Paris Convention for the Protection of Industrial Property*, 20 March 1883, Revised at Stockholm, 14 July 1967, 21 UST 1583, 828 UNTS 306. See also note 213 below.

²²¹ G H C Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property, as Revised at Stockholm in 1967* (World Intellectual Property Organisation, 1968) 17 and onwards.

²²² Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10 *Journal of Economics and History* 1, 3 - 5.

²²³ Peter K Yu, "Currents and Crosscurrents in the International Property Regime" (2004) 38 *Loyola of Los Angeles Law Review* 323, 349.

²²⁴ Please refer to Article 2 of the Paris Convention. Available here: <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html> at 11 October 2012.

patent protection legislature in an effort to provide sufficient entrepreneurial freedom within struggling or fledgling industries. The concept of contextualised enclosure is not entirely novel nor is it unobtainable, and it could simply be a matter of backtracking through years of global legislative strengthening. And in today's digital age the need for autonomous decision-making to create viable localised intellectual property systems has never been more crucial.

5. The Consequence of Intellectual Enclosure: Price Inflation and Construction of Scarcity

Thus far, this paper has explored the processes by which intellectual goods are enclosed and the reason for its enclosure by the respective right-holders who wish to exploit them. This paper has also explored some of the more pragmatic resultant consequences of the enclosure of intellectual goods and has alluded to the causative role that monopolistic price inflation has had; paying particularly close attention to the issue of access to medication in less developed countries. The issue to be addressed now, explores the market forces and the underlying factors characteristic of trade; all of which drives the need for corporations to price their goods highly and thus create market segregation through discriminatory pricing.

On the matter of price discrimination²²⁵, Boyle states that corporations seek to establish an efficient monopoly which is able to achieve perfect price discrimination.²²⁶ That is to say, corporations ideally want to be able to charge every consumer the exact maximum price for its products as the consumer's ability and willingness to pay will allow.²²⁷ Market segregation is important to corporations since it successfully identifies and isolates consumers with large spending power in any given population and allows for more strategic marketing practices through demographic targeting.²²⁸ In economic terms, this is advantageous as it gives corporations which are essentially intellectual goods vendors, an indication of the nature and number of products that should be manufactured and prevents wastage through the stockpiling of surplus. This practice also further identifies the most

²²⁵ Previously discussed, price discrimination occurs when a market is divided and where a clear disparity is pronounced by products entering the market. This effectively separates the rich from the poor, or rather those who can afford and those who cannot. This bars not only the poor but also increasingly middle-income households from having access to informational, technological and pharmaceutical goods which are all priced highly to cater to the richer classes within society.

²²⁶ James Boyle, "Cruel, Mean, or Lavish?: Economic Analysis, Price Discrimination and Digital Intellectual Property" (2000) 53 *Vanderbilt Law Review* 2007, 2007 - 2009.

²²⁷ Boyle, see note 48 above, 50.

²²⁸ Craig Smith and Elizabeth Cooper-Martin, "Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability" (1997) 61(3) *Journal of Marketing* 1 at 1 - 2.

suitable places and methods necessary for maximum sale and distribution of any intellectual goods entering a market.

Under the current legislative regimes, the granting of statutory rights over intellectual property is not indefinite, and only allows for a temporary monopoly. Right-holders must therefore continually reinforce the chronological terms which they might have over their intellectual property.²²⁹ Besides lobbying for extended terms and thus effectively prolonging their monopolistic rights over an intellectual good, right-holders must also ensure that the maximum amount of profit is derived before the subsequent expiry and extinguishment of their temporary rights. This also goes towards explaining the aggressive attitude with which corporations take in their approach towards the pricing of intellectual products. Bearing in mind also that a corporation is accountable to all its shareholders and is itself driven by a capitalistic agenda; both of which act as the driving force behind a corporation's persistent need to inflate product prices.²³⁰ One must thus realise that the main prerogative of any profit driven entity is to maximally exploit any and all available revenue streams and in light of the influence of external market forces, corporations have adopted certain responsive measures to ensure that their monopolies are maximally exploited.²³¹

An example of such a responsive approach, would be the practice of corporations to minimise the effect of external costs upon their profit margin. Corporations do so by internalising the cost of such externalities and then including it within the sale prices of their intellectual goods and as such transfer the burden of externalities onto consumers directly. As noted by Christopher May,

the key aspect of the imposition of a property regime over commons is not the enjoyment by users of absolute property over their resources, but rather the cost they have to take into account when their use conflicts with another owner's interests. By awarding property rights, what was previously an externality, a cost others had to bear, can now be included by charging users on the basis of their liability where other's resources are degraded.²³²

²²⁹ May, see note 34 above, 125.

²³⁰ Ove Granstrand, *The Economics and Management of Intellectual Property: Towards Intellectual Capitalism* (Edward Elgar, 2000) 22 - 24.

²³¹ Ibid, 26.

²³² May, see note 34 above, 129.

What May emphasises in this particular quote is that the externality costs envisaged by corporations are derived from two main sources, (1) the cost of acquiring another's intellectual resources for the creation of the product and (2) an anxiety that users will illegally use, copy or transmit the right-holder's intellectual property and thereby undermine their right to economic reward through missed markets.

Firstly, externalities derived from the acquisition of resource includes the purchasing of patent licenses and other licensing fees associated with the use of another's technological discoveries and processes.²³³ And with the increase industry usage of "reach through license agreements" ("RTLA") and overlapping technological patents and protective measures, the cost of "intellectual raw-materials" are becoming more expensive and harder to secure.²³⁴ For example an RTLA is created between a patent owner and an individual who wishes to use the respective patent as an intellectual resource for his or her own subsequent creative efforts. This RTLA thus allows a patent owner the right to reach downstream to collect rents, royalties, or options on any discoveries or lucrative products created as a result of the secondary user's own intellectual pursuits.²³⁵ In such an instance, the pricing of a product is inflated so as to allow for the remuneration and profit of the subsequent creator and any multiple upstream patent contributors.

Secondly, externalities attributable to intellectual property also involves the expensive process of lobbying for legislative protection and even the enforcement of intellectual property rights against infringers through litigation. Both of which are costly processes and are also external costs which are transferred onto the final consumer.²³⁶ Right-holders also fear the degradation of profit through infringement and take into account such potential losses by inflating prices. This market practice of externality transference thus has detrimental effects going toward the increasing market segregation and unfairly prejudices *bona fide* consumers; those who have no desire or intention of infringing the right-holder's intellectual property protection.²³⁷

²³³ Carl J Dahlman, "The Problem of Externality" (1979) 22(1) *Journal of Law and Economics* 141, 141 - 3.

²³⁴ Lessig, see note 7 above, 97.

²³⁵ Runge and DeFrancesco, see note 45 above, 1720.

²³⁶ Patricia M Danzon, "Price Discrimination for Pharmaceuticals: Welfare Effects in the US and the EU" (1997) 4(3) *International Journal of the Economics of Business* 301, 305 - 6.

²³⁷ Irena Vida, "Determinants of Consumer Willingness to Purchase Non-Deceptive Counterfeit Products" (2007) 5(3) *Managing Global Transitions* 253, 254.

Another method by which corporations seek to maintain and justify higher pricing, as attributed to the influence of market factors, would be through the construction of “scarcity”.²³⁸ Market concerns encourage the concept of “scarcity” because higher prices can be justified where resource availability is low. And also where innovative steps have been taken to streamline process of creation to reduce resource wastage through the creation of lower yield but higher value-added products in favour of mass production. However as Kenneth Arrow argues intellectual goods have many characteristics which distinguishes it from any other physical goods modelled in economics and cannot therefore suffer from resource scarcity.²³⁹

The construction of scarcity over intellectual raw-materials²⁴⁰ can be explained by means of deductive reasoning. For example, if no proprietary rights are afforded over information, then there is no control, and no construction of scarcity since the protected information would be freely available to all. However once the information is freely disseminated or made available, it loses any notion of value simply because any product which has no demand becomes meaningless as a commodity.²⁴¹ Take for instance rudimentary scientific knowledge that is freely available, it would thus be absurd to expect an individual to pay a premium to ascertain that gravity causes objects to fall towards Earth. As such, the central purpose of intellectual property rights therefore is to construct an artificial scarcity where none exists.²⁴² And as Arrow notes, there are many paths and instances where knowledge diffuses readily: (1) piracy, (2) transfer of technology through skilled migration, (3) introducing an intellectual product to the market itself increases the probability of successful duplication, (4) the sale of written or oral materials for the motive of income generation and (5) informal knowledge sharing practices.²⁴³ As such corporations suppress and limit the dissemination of its informational, technological and scientific discoveries so as to prevent

²³⁸ Kenneth J Arrow, “The Economics of Information: An Exposition” (1996) 23 *Empirica* 119, 120.

²³⁹ Arrow, see note 238 above, 119.

²⁴⁰ The construction of scarcity over intellectual raw materials can also be explained thusly: creating a lack of access to intellectual raw materials. If intellectual raw materials is scarce, it would then mean that it would be expensive to secure. In that sense secondary right-holders, having paid a premium to secure a patent or licensing fee, can then justify selling his own product at a high price. This notion of scarcity therefore perpetuates this dictum: intellectual resources are expensive and therefore intellectual goods are expensive.

²⁴¹ Arrow, see note 238 above, 126 - 7.

²⁴² May, see note 34 above, 128.

²⁴³ Arrow, see note 238 above, 125 - 6.

any of their intellectual goods from suffering from the consequence of demand-degradation and subsequently price devaluation.²⁴⁴

The fundamental and prophylactic tactic employed by corporations to retain control over their intellectual resource would be to maintain secrecy²⁴⁵, which is allowed under the TRIPS Agreement since it has established a basal level of protection for trade secrets under Article 39(3).²⁴⁶ Alternatively, and more importantly, scarcity is established through the assignation of proprietary rights over intellectual goods. This has accounted for the increased consciousness shift within the political economy to employ exclusionary rights as a predominant power to restrict use rather than to seek compensatory actions after illicit usage has occurred.²⁴⁷ It is this move from “holding to withholding”²⁴⁸ that has key implications toward understanding the contemporary intellectual property conundrum; or the antagonistic relationship between the practice of unfair pricing and its consequential effects of scarcity, against the ideals of “social good” in terms of public access to information and intellectual goods.²⁴⁹

6. A Case Study of the Impact of Scarcity on Scientific Information

The creation of scarcity which seeks to suppress the freedom of intellectual raw-material is especially profound and problematic in the field of medical discovery and scientific research. Fiona Murray and Scott Stern stated that formal intellectual property rights have detrimental impacts on the “production and diffusion of ‘dual knowledge’”.²⁵⁰ Which is a term coined by them to encapsulate ideas which (1) have value as scientific discovery and which (2) are an inventive construct for future innovation and discovery. Murray and Stern further stress that more instances of scientific knowledge is falling within the category of protected and withheld information; safeguarded by corporations. The withholding of these ideas for

²⁴⁴ May, see note 34 above, 129.

²⁴⁵ Arrow, see note 238 above, 124.

²⁴⁶ TRIPS Agreement Article 39(3), this provision allows for the protection of undisclosed information which has not been covered previously by any other multilateral agreement.

²⁴⁷ Ben Depoorter, “The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law” (2004) 9(4) *Virginia Journal of Law and Technology* 1, 45 - 6.

²⁴⁸ John Commons, *Legal Foundations of Capitalism* (University of Wisconsin Press, 2nd ed, 1959) 53.

²⁴⁹ May, see note 34 above, 132.

²⁵⁰ Fiona Murray and Scott Stern, “When Ideas are Not Free: The Impact of Patents on Scientific Research” in Josh Lerner and Scott Stern (eds), *Innovation Policy and the Economy Volume 7* (2007) 33, 34.

commercial exploitation is in turn stifling the subsequent outputs of both contemporary and future academics in the field of scientific research.²⁵¹ The reason for this continual entanglement between corporate commercialisation and academic research is due to the practice of privatised academic funding.²⁵² This elevates the role of universities from mere educational institutions to external sources of research and development for wealthy private corporations which seek tangible benefits from funding commercially viable scientific discoveries.²⁵³ The fostering of such relationships between universities and corporations has been the subject of much controversy as commentators claim that corporate influence has compromised the “purity” of academic research and shifted the focus of research from scientific altruism to mere commercialisation.²⁵⁴

An instance of the intertwining relationship between academia and corporate capitalism can be clearly seen from the development of the “Oncomouse” by Phil Leder, a professor in the Genetics department at the Harvard Medical School.²⁵⁵ The Oncomouse was the first genetically engineered mouse, and was created through novel transgenic techniques employed by Professor Leder when an onco-gene was inserted into a mouse embryo.²⁵⁶ This resulted in the birth of a mouse which was highly susceptible to cancer and in effect meant that a strain of carcinogenic genes had been successfully discovered and isolated.²⁵⁷ This research was subsequently published in medical journals and was granted a broad patent by the U.S Patent Office in 1988. The successful patenting of the Oncomouse sparked controversy since it was the first instance where a living mammal was recognised under the law as property. And also because this meant that Harvard’s licensee, Du Pont, could then aggressively enforce its proprietary rights over the Oncomouse.²⁵⁸ Du Pont sought to enforce RTLAs on subsequent inventions made using the Oncomouse and also demanded review of

²⁵¹ Peter Yun-Hyoung Lee, “Inverting the Logic of Scientific Discovery: Applying Common Law Patentable Subject Matter Doctrine to Constrain Patents on Biotechnology Research Tools” (2005) 19 *Harvard Journal of Law and Technology* 79, 80 - 1.

²⁵² Lee, see note 251 above, 36.

²⁵³ Murray and Stern, see note 250 above, 35.

²⁵⁴ Sheldon Krimsky, *Science in the Private Interest* (Rowman-Littlefield Publishing Co., 2003) 28.

²⁵⁵ Murray and Stern, see note 250 above, 34.

²⁵⁶ T A Stewart, P K Pattengale and P Leder, “Spontaneous Mammary Adenocarcinomas in Transgenic Mice that Carry and Express MTV/myc Fusion Genes”, (1984) 38 *Cell* 627, 627 - 8.

²⁵⁷ *Ibid*, 630 - 2.

²⁵⁸ Michael A Heller and Rebecca S Eisenberg, “Can Patents Deter Innovation? The Anticommons in Biomedical Research” (1998) 280 *Science* 698, 699.

any scientific research publications that used the Oncomouse. This in effect prohibited scientists and academics from freely accessing or sharing any raw-scientific-material related to the Oncomouse and its contributions to cancer research.²⁵⁹

The protectionistic approach which corporate interference has had on the field of scientific research is said to have accounted for the “tragedy of the anti-commons”. A hypothetical concept created by Heller and Eisenberg²⁶⁰, which is an intended play-of-words on Hardin’s original *tragedy* argument aimed at dismissing the idea of the commons.²⁶¹ In the anti-commons hypothesis, it is argued that too many entities have been granted exclusionary rights over privatised scientific knowledge. And this causes the intellectual resource to experience under-utilisation rather than over-use or depletion.²⁶² The hypothesis as explained by Heller and Eisenberg further stipulates that the control of intellectual property rights by corporations can not only inhibit the free flow of scientific knowledge and prevent future researchers from cumulatively building upon their predecessor’s discoveries but also creates additional access barriers due to a significant increase in transaction costs given the fragmentation and overlapping of patent rights necessary for subsequent creation.²⁶³ Heller and Eisenberg explain this by stating that as the norm of scientific research approaches total corporate ownership, then any subsequent attempt at scientific discovery and invention would consist of a combination of fragmentised research data belonging concurrently to several patent owners each demanding licensing fees or RTLAs.²⁶⁴ A practical example of such an increase of access barriers would be patents over biomedical “receptors”.²⁶⁵ In Heller’s and Eisenberg’s words,

[a] recent search of the Lexis patent database disclosed more than 100 issued U.S. patents with the term “adrenergic receptor” in the claim language. Such a proliferation of claims presents a daunting bargaining challenge. Unable to

²⁵⁹ Murray and Stern, see note 250 above, 34.

²⁶⁰ Heller and Eisenberg, see note 258 above, 698.

²⁶¹ Keith Aoki, “Neo-Colonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection” (1999) 6(1) *Indiana Journal of Global Legal Studies* 11, 28.

²⁶² Heller and Eisenberg, see note 258 above, 698.

²⁶³ Robert P Merges and Richard R Nelson, “On the Complex Economics of Patent Scope” (1990) 90(4) *Columbia Law Review* 839, 874.

²⁶⁴ Heller and Eisenberg, see note 258 above, 699.

²⁶⁵ Receptors are molecules found on the surface of a cell and are important in discerning the effect that chemicals have on the longevity of a cell.

procure a complete set of licenses, firms choose between diverting resources to less promising projects with fewer licensing obstacles or proceeding to animal and then clinical testing on the basis of incomplete information.²⁶⁶

Heller and Eisenberg do recognise that the involvement of corporations do allow for an injection of innovation. Not so much as an incentive, but rather as a tool of enablement, since it grants self-motivated scientists the financial means to further their respective fields of research. And as other academics add, the benefit of intellectual property rights can be seen through its facilitative contributions in the creation of a market for ideas and in so doing encourages the disclosure and exchange knowledge, rather than trade secrecy.²⁶⁷ Yet even in light of all its seemingly beneficial consequences, Heller and Eisenberg caution against the continual existence of an anti-commons within the field of medical research due to causal role in increasing transaction costs, fragmentation of intellectual property ownership and the heterogenous interests amongst corporate owners all of which erects barriers to a scientist's access to pre-existing medical research and stifles future scientific outputs for the betterment of society.²⁶⁸

PART IV - THE ADVENT OF PIRACY IN THE AGE OF THE INTERNET

1. The Need for Fairer Pricing and the Internet

As is the case in any debate involving two radically opposing ideals held by differing parties, at present between intellectual property users and right-holders, the logical solution would be to find a fair and median compromise. In this situation, the pricing of an intellectual good must not be inflated, but instead should be set reasonably, enough that both the demands of users and right-holders can be met. By doing so, a right-holder still maintains his right to profit from allowing another the privilege of using his intellectual property, while still allowing the said property to be made maximally available to users to access owing to its

²⁶⁶ Heller and Eisenberg, see note 258, 699.

²⁶⁷ Murray and Stern, see note 250 above, 36.

²⁶⁸ In their paper, Heller and Eisenberg argue that diversity in the field of medical research is also threatened. This is because corporations are more "end-product" oriented and seek to invent medications which cater for more wide-spread and common illnesses. And therefore address more common diseases and ailments such as cancer and AIDs, but also fail to spur research in other less-well-known diseases. For more information please refer to: Heller and Eisenberg, see note 258 above, 700.

affordability.²⁶⁹ Or in the case of medicines, Flynn, Hollis and Palemedo state that medicines should be accessible to consumers through more competitive pricing and yet the pricing should remain profitable enough to allow pharmaceutical corporations to subsidise further research and develop medicines for future generations to come.²⁷⁰

Yet, the very thought of placing a seemingly “reasonable” price on a particular product is itself cause for much discourse. Since an author or inventor values the creation of a product or work based on abstract sums of: (1) how much effort and resource is expended in the process of creation, (2) the perceived benefit that the product or work provides to society and lastly (3) an element of profit-incentive.²⁷¹ The next requirement that is to be satisfied would be the constructive knowledge present within the consumers themselves, which is to say: the consumer must fully appreciate the qualities and characteristics present within that particular product, and having internalised those qualities, must come to the objective conclusion that the product is of good value-for-money.²⁷²

Despite the fact that the complexities associated with price estimation are daunting, intellectual property owners nevertheless must still bear the onus of ensuring that the pricing of their goods are non-discriminatory, meaning that it is not inflated to the point where consumers are barred access through no fault of their own, except that the goods are simply beyond their financial capacity.²⁷³ This may not seem like a serious issue in relation to technological luxury goods; an individual certainly would not experience any serious impairment without the latest mobile phone or tablet. This “don’t-buy-it-if-you-can’t-afford-it” approach however is inadequate if it is to consider larger social welfare implications such as the overpricing of medication crucial to sustaining life or even the overpricing of or cultural content necessary for educative enrichment.

²⁶⁹ Howard B Abrams, “Originality and Creativity in Copyright Law” (1992) 55 *Law and Contemporary Problems* 3, 3 - 5.

²⁷⁰ Flynn, Hollis and Palemedo, see note 56 above, 4.

²⁷¹ Richard Posner, *Economic Analysis of Law* (2011, Aspen Publishers, 8th ed) 11 – 12. Take note of point (2), because medicines are seen to greatly benefit society, they are often sold at greater prices due to this justification.

²⁷² Richard S Markovitz, “The Causes and Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis” (1975) 28 *Stanford Law Review* 1, 12.

²⁷³ May, see note 34 above, 141.

Professor Wendy Gordon has warned that high pricing also poses a detriment to intellectual property owners/vendors themselves, as it could allow for “market failure”.²⁷⁴ In her paper, Professor Gordon posits that stronger intellectual property protection schemes could cause products to become too expensive and inefficient to sell within a market and the result of which would effectively cause the alienation of any potential consumers and drive them to seek cheaper alternatives instead. A solution proposed by Professor Gordon, was that high-pricing could be cured through accessible, low-cost marketing and smaller automated transactions (or “micro-transactions”).²⁷⁵ By establishing an accessible and direct market channel that consumers can readily rely on, they will then have no need to find illicit means to obtain the desired product. Vendors can also reduce the number of resellers and additional external costs within the chain of sale, which the product takes en route to the consumer, and can thereby reduce price inflation resultant from the number of increased transaction costs.²⁷⁶

The two notions raised above, (1) the need to increase consumer knowledge of an intellectual product and (2) the need for international “micro-transactions” can be taken in combination as a viable approach to combatting high price inflation. And as James Boyle points out, the Internet embodies the ideal mechanism to do just that.²⁷⁷ Online stores have the potential to offer widespread accessibility across the globe and also offer a direct market linkage between vendors and consumers. Transactions through online stores are also automated and thereby eliminate externalities associated with distributorship and operating conventional retail shopfronts; such as staff wages, shop rental and utility fees. The reason why such intellectual property vendors have yet to fully embrace such an Internet phenomena would be due to the consequential effect that the increased competitiveness of online transactions will inadvertently have on their conventional shopfront businesses, which will undoubtedly suffer from a decline in profitability.²⁷⁸ However, for the sake of consumer satisfaction and welfare, business models must be adaptable and must be flexible in its approach towards revenue generation.²⁷⁹

²⁷⁴ Wendy J Gordon, “Fair Use as a Market Failure: A Structural and Economical Analysis of the Betamax Case and its Predecessors” (1982) 82 *Columbia Law Review* 1600, 1604.

²⁷⁵ Gordon, see note 274 above, 1628.

²⁷⁶ *Ibid*, 1629.

²⁷⁷ Boyle 2, see note 122 above, 18.

²⁷⁸ The Australian, *Online Piracy and Digital Delivery Erasing the DVD Store* (2011) <<http://www.theaustralian.com.au/news/nation/online-piracy-and-digital-delivery-erasing-the-dvd-store/story-e6frg6nf-1226109399433>> at 7 September 2012.

²⁷⁹ Michael E Porter, “Strategy and the Internet” (2001) *Harvard Business Review On Point Article* 1, 2 - 3.

Boyle further states that the Internet does offer several disadvantages as it also lowers the cost of copying and obviously attributes too to increased instances of illicit transmission and file-sharing. The advantages of the Internet however far outweighs its disadvantages, since it also allows for lowered costs of production, distribution, advertising and exponentially increases the exposure that vendors have to that of the potential global market. And as aptly put by Boyle, “[a] large leaky market may actually provide more revenue than a small one over which one’s control is much stronger”.²⁸⁰ This analogy is used to rebut any arguments put forward by fearful and skeptical intellectual property right-holders which present the Internet in a negative light; as a dangerous medium for trade owing to the ease of digital content infringement and which should be strongly regulated.

2. A Case Study of Corporate Culture Embracing the Internet

In April 2003, Apple Computer launched its new flagship store. The difference, however, between this store and any of Apple’s pre-existing conventional stores was that this store was located online: the iTunes Music Store.²⁸¹ The launch of Apple’s iTunes store was a resounding success; having sold 30 million downloads by the end of the year.²⁸² Apple’s 99-cent-song business model, pioneered through its iTunes store, has since revolutionised the way in which digital medium files are sold and transmitted over the Internet. The store charged a mere 99 cents for an individual song and about USD\$9.99 for an entire album. For the first time in history, low-priced music downloads from five major record labels were made legitimately available online in one concise source.²⁸³ At the close of 2003, both Fortune and Times Magazines crowned iTunes as the “Product of the Year”²⁸⁴ and the “Invention of the Year”²⁸⁵ respectively. Since then many corporations have tried to mimic Apple’s success. Other less successful emulations have faded into obscurity, but some have

²⁸⁰ Boyle 2, see note 122, 19.

²⁸¹ Apple Press Info, “Apple Launches the iTunes Music Store”, available here: <<https://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html>> at 11 October 2012. Apple launched iTunes on April 28 2003, and Steve Jobs is quoted saying: “The iTunes Music Store offers the revolutionary rights to burn an unlimited number of CDs for personal use and to put music on an unlimited number of iPods for on-the-go listening”.

²⁸² Frank Ahrens, Music Fans Find Online Jukebox Half-Empty, *Washington Post* (Washington), 19 January 2004, A1.

²⁸³ Laurie J Flynn, “Apple Offers Music Downloads with Unique Pricing”, *New York Times* (New York) 29 April 2003, C2.

²⁸⁴ Peter Lewis, “Product of the Year”, *Fortune* (New York) 22 December 2003, 188.

²⁸⁵ Chris Taylor, “The 99 cent Solution”, *Time* (New York) 17 November 2003, 66, 68.

experienced equally triumphant results.²⁸⁶ For example, Roxio subsequently purchased Napster's²⁸⁷ name and intellectual property assets during Napster's bankruptcy proceedings in October 2003²⁸⁸, following Napster's infamous litigation against Heavy Metal band Metallica.²⁸⁹ Roxio subsequently relaunched Napster as a music downloading service which also offered 99-cent-songs and a \$10 subscription free which granted users unlimited access to music content and faster "tethered downloads".²⁹⁰ And in a bid to compete with Apple, the newly relaunched Napster entered into subsequent agreements with Samsung to co-market Napster's music store.²⁹¹ This co-venture with Samsung has since become the basic foundation for Apple's biggest rival; the Android Store.

The appeal and success of iTunes, besides its cheap prices, was also attributed to its notion of legitimacy; which for customers meant guilt-free downloads, and the avoidance of spyware and viruses which were often piggy-backed onto illegal downloads.²⁹² However there is growing discontent with Apple's iTunes amongst contemporary users, ranging from

²⁸⁶ Some examples of similar business models which tried to emulate iTunes' success: MusicNet, Napster, Rhapsody, Buy.com, Sony's Music Store, Musicmatch and Microsoft also announced a similar business campaign. Please refer to John Borland, "Sony to Launch Net Music Service", *CNET News.com* (2003) <<http://news.cnet.com/2100-1027-5071475.html>> at 11 October 2012.

²⁸⁷ Napster is a significant technological milestone because it was a massively utilised database or online informational commons. It was built by a network of volunteers and users. It was an online directory of music files and was enlarged with each user's input - by converting a CD into an MP3 file, which was then made available for others to download, while at the same time also granting the uploader access to any other files available in the network itself as reward for his or her initial contribution. For more information see: Dan Bricklin, "The Cornucopia of the Commons" in Andy Oram (ed), *Peer-to-Peer: Harnessing the Power of Disruptive Technologies* (2001) 41, 42 - 4.

²⁸⁸ Peter K Yu, "The Copyright Divide" (2003) 25 *Cardozo Law Review* 331, 388. Herein referred to "Yu 2".

²⁸⁹ Benny Evangelista, "Metallica Suit Rocks Napster", *San Francisco Chronicle* (San Francisco), 14 April 2000, B3. See also: Christopher Jones, "Metallica Rips Napster", *Wired.com* (2000) <<http://www.wired.com/politics/law/news/2000/04/35670>> at 11 October 2012.

²⁹⁰ A song file downloaded from a music subscription service that can be played only on computers registered to the account, as opposed to untethered downloads, which can be played on compatible portable devices. Definition from: <http://reviews.cnet.com/4520-6029_7-6447112-1.html> at 11 October 2012.

²⁹¹ Peter K Yu, "P2P and the Future of Private Copying" (2005) 76 *University of Colorado Law Review* 653. 669 - 70. Herein referred to as "Yu 3".

²⁹² Yu 2, see note 288 above, 432.

security breaches and unauthorised charges on users' accounts²⁹³ to the recently debated fact that iTunes subscribers do not have ownership rights over their content downloads and purchases.²⁹⁴ Though this recent debate has been brought about by questionable sources²⁹⁵, it however does not detract from the important social issues which such a debate raises. (1) iTunes users do not actually own the music they have purchased and are therefore not extended any form of proprietary rights over their digital music collections. And (2) this late realisation of the fact is due to the complex and arduous nature of Apple's iTunes Licensing Agreement which spans over 56 iPhone screens²⁹⁶ or 41 conventional A4 sized pages.²⁹⁷ The implementation of Apple's mass licensing practice was launched at the time of its creation in 2003 but has now become a topic of hot debate only 9 years later. As author Mel Martin satirically remarks, "I've bought cars with less paperwork. [Come on], Apple. Get it together."²⁹⁸ Such a quote exemplifies the outrage and dissatisfaction that consumers have towards Apple, and has caused consumers to view the unnecessarily long and complex agreement as a means employed by Apple to intentionally confound and prevent consumers from fully understanding their rights under Apple's terms of use. The phrase also emphasises the difficulties that a lay-person would have with deciphering such a lengthy agreement; provided that the ordinary lay-person even entertains the slightest desire to read the agreement at all.

By converting intellectual products from a proprietary good into a mere "service for use" in Apple's mass licensing approach, it denies consumers the same protections or rights they

²⁹³ John P Mello Jr, "Complaints of Bogus iTunes Charges Go Back Weeks", *PCWORLD* (2010) <http://www.pcworld.com/article/203942/complaints_of_bigus_itunes_charges_go_back_weeks.html> at 11 October 2012.

²⁹⁴ Neil Sears, "Bruce Willis Fights to Leave his iPod tunes to his Family", *DailyMail Online* (2012) available here: <<http://www.dailymail.co.uk/news/article-2197248/Bruce-Willis-fights-leave-iPod-tunes-family-Actor-considering-legal-action-Apple-battle-owns-songs-downloaded-iTunes.html>> at 11 October 2012.

²⁹⁵ Charles Arthur, "No, Bruce Willis isn't Suing Apple Over iTunes Rights", *Guardian Technology Blog* (2012) <<http://www.guardian.co.uk/technology/blog/2012/sep/03/no-apple-bruce-willis>> at 11 October 2012. Proper investigative journalism has revealed that Bruce Willis is not in fact behind the litigation. The use of famous actor Bruce Willis' name is instead seen as an attempt by the media to give more exposure to the debate, or even to sensationalise the debate itself. Nevertheless this issue it still raises pertinent considerations and does deserve academic deliberation.

²⁹⁶ Mel Martin, "Got Time to Spare? Read the iTunes Store Agreement" *TUAW.com* (2011) <<http://www.tuaw.com/2011/01/10/got-time-to-spare-read-the-itunes-store-agreement/>> at 11 October 2012.

²⁹⁷ Full Licensing Agreement available here: <<http://www.apple.com/legal/itunes/uk/terms.html#SERVICE>> at 11 October 2012.

²⁹⁸ Martin, see note 296 above.

would ordinarily have if they were to purchase an intellectual product through any other legitimate or conventional means.²⁹⁹ As aptly noted in *The Digital Dilemma*, “[b]uy a book and you own it forever; pay for a service and when the period of service is over, you (typically) retain nothing”.³⁰⁰ The effect of which means the lost of hundreds and even thousands of dollars of purchases for minor or accidental breaches against Apple’s onerous Licensing Agreement (termination of an account is a discretionary right held by Apple at all times) or even a hardware failure on the consumer’s part.³⁰¹ And this also allows Apple and the respective music copyright holders to extend its restrictive control over downloaders unreasonably. Since licensed downloads grant only a right to use, it does not transfer ownership of the digital content onto the consumer, who are therefore not extended the privileges within Fair Use exceptions. For example, a consumer may not employ the legal justification governed under the “first-sale doctrine” to legally create or acquire copies of a copyrighted work following the user’s *bona fide* purchase of the intellectual property. Also, consumers are barred from transferring music files from their computer to other mediums disallowed under Apple’s Licensing Agreement. For example, though a consumer is allowed to synchronise his music onto his iPod, he may not however move his music onto a third-party music player or home entertainment system.³⁰²

Another problematic issue associated with the use of iTunes’ mass licensing practice is that it fails to recognise the fact that many record companies do not have the rights to release all of its content onto the Internet.³⁰³ The reason for this is because recording companies may own the copyright in the sound recording (the expression) but may not have statutory rights over the use of the composition of the song itself. For example, recording companies might

²⁹⁹ Yu 3, see note 291 above, 702.

³⁰⁰ National Academy of Sciences, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academy Press, 2000) 101.

³⁰¹ There are multiple instances and anecdotes of first-hand user examples with the lost of purchases from iTunes. Though these examples are informal “blogs” on the Internet and therefore should not be taken too seriously, it does however aptly show the frustration that users have with “not owning their purchases”. And it is mind boggling for a consumer to think that every cent spent on iTunes is merely for a temporal right to enjoy the music they have paid for. For a good example, please refer to Matt Butcher’s blog article available here: <<http://mjb0123.blogspot.com.au/search?q=iTunes>> at 11 September 2012. In his blog, Butcher recounts his frustrating experience, when his computer malfunctioned causing his hard-disk to be erased, causing him to lose all his music legitimately purchased from iTunes store. After which Apple refused to allow him to re-download the songs which he had already purchased owing to the fact that contrary to the “*iTunes Store Terms of Sale*”.

³⁰² Yu 3, see note 291, 702.

³⁰³ Lydia P Loren, “Untangling the Web of Music Copyrights” (2003) 53 *Case Western Reserve Law Review* 673, 697 - 8.

therefore have the right to release a song on a physical medium (such as compact disks)³⁰⁴, but may not do so in a digital format for online consumption which requires rights for both the sound recording and the actual composition.³⁰⁵ Further, record companies may even be unwilling to provide content³⁰⁶ to which it does have the rights to release, since iTunes downloads are susceptible to unauthorised hacking by third-party softwares which allow users to import songs from their iTunes libraries directly onto their hard-disks.³⁰⁷ As such, though the iTunes store may offer more than 20 million songs for download³⁰⁸, this figure however pales in comparison to the number of songs available on illegal peer-to-peer (“P2P”)³⁰⁹ networks.³¹⁰

As Peter Yu remarks, “[u]nless music content is released without restrictions, consumers are unlikely to be satisfied and will eventually turn to black markets in the Darknet or use illegal means to relocate their legally purchased music files”.³¹¹ What Yu stresses in this quote is

³⁰⁴ John Borland, “Beatles Catalog Headed for Digital Distribution?” *CNET News.com* (2004) <http://news.cnet.com/Beatles-catalog-headed-for-digital-distribution/2100-1027_3-5228914.html> at 11 October 2012.

³⁰⁵ Jessica Litman, “Sharing and Stealing” (2004) 27 *Hastings Communication and Entertainment Law Journal* 1, 21 - 2.

³⁰⁶ There are also other considerations, for example a music content provider maybe unwilling to allow its music on iTunes arising out of negotiation disputes and pricing. For example please see Greg Sandoval, “Music Publisher Blocked iPhone 5 Music Service” *CNET News.com* (2012) <http://news.cnet.com/8301-1023_3-57522219-93/music-publisher-blocked-iphone-5-music-service-report-says/> at 11 October 2012.

³⁰⁷ Lars Pasveer, “Hacker Takes Bite Out of Apple’s iTunes”, *CNET News.com* (2004) <http://news.cnet.com/2100-1002_3-5308337.html> at 11 October 2012.

³⁰⁸ Leena Rao, “Apple: iTunes Now has 20M Songs; Over 16B Downloads”, *Techcrunch* (October 4, 2011) <<http://techcrunch.com/2011/10/04/apple-itunes-now-has-20-million-songs-over-16-billion-downloads/>> at 11 October 2012.

³⁰⁹ P2P networks are synonymous with the names Napster and KaZaA which were software programs which pioneered the process by which users were able to connect to one another through software. This software enabled the users to simultaneously upload and download files through a network which consisted entirely of fellow users and therefore did not require any file hosting services. For more information, see: Parameswaran Manoj and Susarla Anjana “P2P Networking: An Information Sharing Alternatives” (2001) *Computer Practices* 31, 31 - 2.

³¹⁰ Fred von Lohmann, “A Better Way Forward: Voluntary Collective Licensing of Music File Sharing” (2008) *Electronic Frontier Foundation White Paper* 1, 2 - 4. Lohmann also explains the reasoning behind why P2P networks can offer more songs, which is because users can upload esoteric genres of content and not just popular mainstream content for download. P2P networks also offer out-of-print content which can no longer be found commercially. All of which, makes content more readily available on illegal file-sharing networks as opposed to legitimate networks.

³¹¹ Yu 3, see note 291 above, 702.

that legalised and commercialised methods of online transactions are often subject to unnecessary hassle and restrictions owing to right-holders trying to fervently protect their intellectual property. This is off-putting for consumers and will leave users, whom have had bad experiences with such legalised online stores, to shun legitimate practices and instead encourages more users to seek out more attractive illegal alternatives. In simple terms, if legalised stores want to compete with illicit download platforms, corporate right-holders must strive to be as attractive, if not more attractive, to entice and retain its consumer base³¹² and justify why consumers should purchase their products and not illegally download free content.

At the close of 2011, Apple announced that it had delivered 16 billion song downloads to consumers since its launch in 2003.³¹³ However economic and tech-analysts maintain that iTunes itself is not a monolithic “money maker” since its 99-cent-business-model actually allows for very little direct profit. As explained by Peter Kafka, the iTunes store is seen by Apple as a supplementary mode of service-provision which is meant to compliment Apple’s primary form of business; the sale of technological products.³¹⁴ Though the iTunes store, as a valid money-making business model, is being questioned, as a case study however, it is significant because it raises the pertinent issue of whether the cheaper pricing of intellectual goods will be sufficient to encourage legitimate purchases and ultimately to discourage online piracy. In this instance the marriage of cheaper prices and the transference of intellectual property rights onto consumers has not been as seamless as it ought to be. Given the long-reaching and intrusive restrictions that are subsequently placed on content that consumers have legitimately purchased. What this case study therefore exemplifies is this: (1) consumers are willing to pay for legitimate intellectual goods provided the price is reasonable and affordable. And with that exchange of money, (2) consumers also expect a certain level of protection and freedom over the goods which have now come under their possession. This unwillingness, by intellectual good vendors to embrace either of the two consumer prerequisites, is what is driving the upward swell of online piracy.

³¹² Vivian Reding, “Digital Europe - Europe’s Fast Track to Economic Recovery” (Speech, delivered at the The Ludwig Erhard Lecture, Brussels, 9 July 2009), 9.

³¹³ Rao, see note 308 above.

³¹⁴ Peter Kafka, “Apple: Billions of Songs, Billions of Apps, But Not Much Profit” *All Things Digital* (2010) <<http://allthingsd.com/20100225/apple-billions-of-songs-billions-of-apps-not-much-profit/>> at 11 October 2012.

3. The Proliferation of Internet File-Sharing

In 2011, researchers at *markmonitor.com* classified 43 unique websites as being “digital piracy sites” which offer file-hosting services and direct download capabilities for illegally uploaded copyrighted content.³¹⁵ According to their investigations, the online traffic generated by these sites exceeded 146 million distinct visits per day or 53 billion visits per year.³¹⁶ From those 43 sites, the Top 3 sites (*rapidshare.com*, *megavideo.com* and *megaupload.com*) alone were estimated to generate 21 billion visits per year.³¹⁷ These figures however are merely the tip of the iceberg, since they reflect but one form of illegal file-sharing activity. In truth, there are myriads of zero-cost alternatives and forms of illegal file-sharing which online denizens use to download songs, ebooks and movies. Other alternatives besides those direct download websites also include file-sharing P2P networks³¹⁸, video streaming sites and even softwares which allow “reverse ripping”.³¹⁹

In the United States, Vice President Joe Biden openly condemned illegal online file-sharing in a press conference in 2010. Biden, introducing the American government’s latest Joint Strategy Plan on Intellectual Property Enforcement³²⁰, stated that “piracy is theft. Clean and simple. It’s smash and grab. It [is] no different than smashing a window at Tiffany’s and

³¹⁵ Press Release, “Report Sheds Light on Scale and Complexity of Online Piracy and Counterfeiting Problem”, *MarkMonitor (Part of Thomson Reuters)* (2011) <<https://www.markmonitor.com/pressreleases/2011/pr110111.php>> at 11 October 2012.

³¹⁶ Visits or “hits” are counted on the basis of being “distinct” since each individual visitor has a unique “Internet Protocol” or “IP” address allocated to him or her. IP addresses distinguish a person’s Internet service provider and identifies a person’s geographical location. This means that such digital piracy sites experienced 146 distinct user visits from isolated sources all over the globe.

³¹⁷ MarkMonitor, “Traffic Report: Online Piracy and Counterfeiting” (2011) *MarkMonitor (Part of Thomson Reuters)* 1, 4. Full report available here: <https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf> at 11 October 2012.

³¹⁸ Other P2P networking tools like BitTorrent has 100 million worldwide monthly users and at least 20 million daily active users. Please see J Moya, “BitTorrent Mainline, uTorrent reach 100 Million Combined Monthly Users”, *Zeropaid.com* <<http://www.zeropaid.com/news/91839/bittorrent-mainline-utorrent-reach-100mln-combined-monthly-users/>> at 11 October 2012.

³¹⁹ Reverse ripping software allows users to enter a video’s URL into its program, and after a short conversion process, converts the nominated video link into a downloadable file (either in pure audio format, or in a video and audio format). This software is used to predominantly download videos from youtube.com, a legitimate streaming website often used by major record labels to promote their music through viral marketing. For an example see: <<http://www.ytddownloader.com/>> at 11 October 2012.

³²⁰ Available here: <http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf> at 11 October 2012.

grabbing [merchandise]”.³²¹ The Vice President’s comments reflect the prosophobia³²² that governments and intellectual property right-holders have in relation to Internet file-sharing. The reasons for this discourse is because file-sharing is seen to attribute to two consequential effects: (1) criminality which defies state law and authority, and (2) missed markets which causes intellectual property right-holders a loss of income for every instance their digital goods are enjoyed for free.³²³ Yet the justifications for the condemnation of Internet file-sharing fails to address larger issues such as the psychological mindset of consumers, the non-rivalrous nature³²⁴ of digital intellectual property or its self-perpetuating and causative role in propagating Internet piracy. As Brett Caraway astutely observes, “[o]ur current understanding of the social dimensions of file sharing is inadequate. In some sense, the term ‘piracy’ camouflages the complex structural foundation of file-sharing activities”.³²⁵

Just this year, Caraway conducted an independent survey which queried 357 active file-sharers to investigate and identify the “structures which condition file-sharing activities”.³²⁶ The question posed was this: “Why do you use P2P applications to acquire music, movies or television programs?”. And as Caraway discovered, many respondents to the survey cited economic motivations as their top reasoning (183 votes out of 357 participants, or 51.3% of the total participants). These respondents also went on to further elaborate that unemployment, financial hardship and the generally high cost of content were some of the economic motivations alluded to. Other reasons cited by file-sharers also included the fact that P2P networks offered higher quality content as opposed to conventional mediums (ranked 2nd with 171 votes), and that some content was unavailable in local markets (ranked 3rd with 121 votes). This was especially the case where expatriates from Western nations desired access to content from their country of origin or content in their own mother tongue. Also, a significant number of file-sharers stated that in some instances they merely wanted to

³²¹ Greg Sandoval, “Biden to File Sharers: ‘Piracy is Theft’”, *CNET News.com* (2010) <http://news.cnet.com/8301-31001_3-20008432-261.html> at 11 October 2012.

³²² A psychological term used to describe the fear of progress.

³²³ Brett R Caraway, “Piracy Cultures: Survey of File-Sharing Culture” (2012) 6 *International Journal of Communication* 564, 564.

³²⁴ As previously discussed, intellectual property is non-rivalrous, meaning to say that an individual is not deprived if an intellectual good is privatised owing to the fact that many individuals can enjoy it simultaneously. This argument has also been reversed to justify piracy which states that the right-holder need not defend his intellectual property rights so vehemently since copying is not actually theft since the right-holder is not actually deprived of his own use of the intellectual property either. For more on this debate, please refer to Green, see note 9 above.

³²⁵ Caraway, see note 323 above, 564.

³²⁶ *Ibid*, 567.

preview the content prior to deciding whether or not they would purchase the content through legitimate channels (this reasoning ranked 4th with 71 votes in total). Lastly, another significant finding of the survey also showed discontent and dissatisfaction with digital rights management systems such as those employed by Apple's iTunes store which prevents the transference of music files from one storage device to another. As such, file-sharers were forced to re-download content which they had already purchased so as to avoid the restriction of format-shifting (this ranked 8th with 34 votes).³²⁷

Though the survey results above are merely exploratory and are not truly indicative of the general sentiments of the entire file-sharing community. It does however give us a practical indicia of the problematic effects that intellectual property regimes have on content pricing and market segregation. And these practical results further reinforce the theoretical stance that academics like Clay Shirky take. Shirky states that Internet piracy is not so much an unwillingness by file-sharers to abide by State laws or an open display of civil disobedience or even the extreme scenario of outright theft³²⁸ as posited by Vice President Biden. What Shirky argues instead is that the behaviour of file-sharers is merely an unexpected turn in consumer demand for cheaper prices and not the absolute rejection of any recognisable pricing system.³²⁹ As shown through the previous case study of Apple's iTunes Store, consumers are willing to pay for legitimate content provided the price is reasonable.³³⁰ However to reiterate, the set of schemes implemented by the music industry known as the Digital Rights Management, seeks to place as many restrictions on digital format content as in the physical world; the inconvenience of copying and transferring music between devices associated with compact disks is to be similarly placed on digital downloads so as to discourage piracy. And furthermore, the music industry's approach towards digital content pricing is said by Shirky to be an uneducated estimate since the rationale is thus: "the music-loving public should be willing to pay the same price for a song whether delivered on CD or downloaded".³³¹

³²⁷ Caraway, see note 323 above, full results collated at pages 567 - 582.

³²⁸ Clay Shirky, "Listening to Napster" in Andy Oram (ed), *Peer-to-Peer: Harnessing the Power of Disruptive Technologies* (2001) 19, 19.

³²⁹ Ibid, 26.

³³⁰ Alain Strowel, "Internet Piracy as a Wake-up call for Copyright Law Makers - Is the 'Graduated Response' a Good Reply?" (2009) 1 *World Intellectual Property Organisation Journal* 75, 76.

³³¹ Shirky, see note 328 above, 27.

In reality however, savvy consumers know the economic costs involved with physical commodities, such as the pressing of compact discs, shipping and distribution costs and retail inflation does not however plague digital content.³³² As such, the pricing system which makes digital downloads comparable to its physical counterparts is unreasonable given that digital content is cheaper to sell and distribute. The approach adopted by the music industry is therefore seen by other academics such as Cenite, Wang, Peiwen and Chan, as being counter-productive since it perpetuates market imperfections, which then promotes the practice of online piracy that costly lobbying seeks to eradicate.³³³ In an attempt to downplay the element of consumerist civil disobedience, Shirky compares the online piracy movement to that of Prohibition in America. In the context of the 1920s ban on alcohol, the criminalisation of alcohol actually increased instances of illegal-bootleg alcohol consumption and caused illegal alcohol manufacturing to flourish as black-market trade blossomed. Following the dissolution of Prohibition laws however, illicit alcohol manufacturing and consumption dropped drastically and has since been abolished. This is because alcohol became “legally available at a price and with restrictions people could live with”, there was therefore no longer a demand for illegal alternative sources of alcohol.³³⁴

Similarly, what is needed in the context of Internet piracy is therefore neither the drastic collapse of legal and commercial mechanisms of control proposed by Internet anarchists, nor the absolute tightening of regulatory control demanded by fanatical intellectual property proponents. It is simply this: the relaxation of restrictions and the reformation of business models to evolve and suit the economics of the Internet age. As Shirky proffers, the relaxation of the music industry’s interference with Internet politics will not diminish their functionality in any other way besides the physical production of compact discs. Rather the music industry should embrace the dissolution of the vexatious problems associated with the distribution of physical compact disks. And focus instead on bankrolling and publicising musicians on a global forum through low-cost innovative viral marketing and reap the abundant profits derived from global content sales.³³⁵

³³² Shirky, see note 328 above, 27 - 8.

³³³ Cenite, Wang, Peiwen and Chan, “More than Just Free Content: Motivations of Peer-to-Peer File Sharers” (2009) 33(3) *Journal of Communication Inquiry* 206, 211.

³³⁴ Shirky, see note 313, 27.

³³⁵ *Ibid*, 28.

4. A Regulatory Effort and an Internet Revolution

In early 2012, the United States congress was in the midst of deciding the workability of the passing of the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA). Both of which were intended to combat against the increasing surge of online piracy and counterfeiting taking place beyond America's legal jurisdiction.³³⁶ Simultaneously the Internet community was in uproar. For the first time in its history Wikipedia intentionally turned off its servers in protest, and other popular social news websites like Reddit followed suit. Even Google placed a black banner over its iconic four-coloured logo in an attempt to emphasis its distaste of involuntary censorship of Internet content.³³⁷ And for weeks leading up to the 18th January protests, individual "hacktivists" took to popular social networking website Facebook to educate the masses of the detrimental effects that SOPA and PIPA would have on the online intellectual commons. Fortunately, the congressional critics were heard and their arguments were sufficient to denounce the proposed laws, which were seen to be overly broad and would be ineffective as a regulatory tool for the Internet. Making direct reference to certain parts of the legislation, critics attacked the judicial reasoning behind holding search-engines like Google and YouTube directly accountable for leading users to pirated content. Additionally SOPA and PIPA would have granted Internet service providers (ISPs) the right to remove any websites that allegedly hosted protected content under existing intellectual property laws.³³⁸ Both the SOPA and PIPA, as part of the same legislative package, were heavily backed by both the Motion Picture Association of America (MPAA)³³⁹ and the Record Industry Association of American (RIAA) which spent an estimated USD\$8 million lobbying the bills in congress.³⁴⁰

³³⁶ Christian Yoder, "A Post-SOPA (Stop Online Piracy Act) Shift in International Intellectual Property Norm Creation" (2012) *The Journal of World Intellectual Property* 1, 1.

³³⁷ J Wortham, "Public Outcry of Antipiracy Bills Began as Grassroots Grumbling", *The New York Times* (New York) 19 January 2012, B1.

³³⁸ Yoder, see note 336 above, 1.

³³⁹ The MPAA has also taken up arms and joined the fray of intellectual property enforcement since movie piracy via file-sharing on both P2P networks and streaming websites has become very rampant. According to a study conducted in 2006, it was estimated that American movie studios lost nearly USD\$6.1 Billion in global sales revenue due to piracy in 2005 alone. See Sarah McBride and Geoffrey Folwer, Studios See Big Rise in Estimates of Losses to Movie Piracy, *The Wall Street Journal* (2006) <<http://online.wsj.com/article/SB114662361192442291.html?mod=home>> at 11 October 2012.

³⁴⁰ Center for Responsive Politics, "Influence and Lobbying", *Opensecrets.org* (2011) <<http://www.opensecrets.org/lobby/indusclient.php?id=B02&year=a>> at 11 October 2012.

This overly aggressive approach coupled with the unabashed “money-throwing” of the film and music industry was a throwback to 2003 when the RIAA commenced thousands of legal proceedings against alleged music copyright infringers.³⁴¹ And in the RIAA’s crosshairs was “virtually everybody”, including telecommunications service providers, consumer electronics developers, Internet entrepreneurs, universities, college researchers, students³⁴² and even individual claims against ordinary users en masse.³⁴³ As Yu noted, in the wake of such actions, the general public has become increasingly educated in the pitfalls of online piracy but have also grown to regard copyright protectionism with disdain.³⁴⁴ The strong-arm tactics employed by the RIAA has in effect antagonised and alienated its consumer market and has altered consumer opinion of the RIAA in this public relations fiasco.³⁴⁵ Consumers now view the music industry as a ruthless power-hungry-entity bent on punishing even the most trivial of infringements with severe and costly lawsuits brought against ordinary citizens with shallow pockets. Worse still, such unnecessarily aggressive tactics will threaten to drive illicit copying and transmission activities further underground and force file-sharers to innovate and sophisticate the current methods of illicit file-sharing.

For example, Internet pirates have turned to proxy file-hosting servers, the creation of offshore websites in nations with more relaxed laws towards online intellectual property infringement, and encrypted P2P systems which are able to mask data; thus making the

³⁴¹ William Henslee, “Money for Nothing and Music for Free? Why The RIAA Should Continue to Sue Illegal File-Sharers” (2009) 9 *John Marshall Review of Intellectual Property Law* 1, 1. According to Henslee, the RIAA has sued over 35,000 people for illegal file-sharing of music as of 2009.

³⁴² Neil W Netanel, “Impose a Noncommercial Use Levy to allow Free Peer-to-Peer File Sharing” (2003) 17 *Harvard Journal of Law and Technology* 1, 7 - 8.

³⁴³ Yu 3, see note 291 above, 682.

³⁴⁴ *Ibid*, 665.

³⁴⁵ Yu 2, see note 288 above, 442 - 3.

transmission of protected files virtually undetectable.³⁴⁶ As *Geek.com* reports³⁴⁷, citing directly the RIAA's and MPAA's insistence on seeking out individuals through unique IP addresses in an attempt to prosecute with legal action. The Pirate Bay (one of the largest online P2P and BitTorrent file-sharing websites) has launched two Virtual Private Network ("VPN")³⁴⁸ services. The first VPN service (iPredator) is available to users for a fee, costing EUR\$15 for 3 months worth of unlimited access, while the second VPN (PrivitizeVPN) service embraces the "free-to-use-advertising" business model. This allows users to freely access the VPN service without any fees, but forces users to install advertising software (or "adware") which intrusively alters a users homepage and Internet search preferences to the VPN sponsor's nominated webpages.³⁴⁹ Further reports also announced The Pirate Bay's goal of launching the world's first unmanned aerial server drones.³⁵⁰ Citing the recent prosecution of *Megaupload.com*'s founder Kim Schmitz³⁵¹, and in anticipation of the passing of SOPA and PIPA, these server drones are to be built with the intention of hovering beyond the jurisdiction and policing of any Earth-bound authorities. Though it might seem like an idea that borders on the realm of science-fiction, such flying drone servers do actually exist

³⁴⁶ Internet service providers track data not so much on the basis of what files are actually being transmitted, but engage in what is known as "traffic management" which identifies the download usage or activity related with P2P services and de-prioritises the bandwidth consumption of such users, which in effect slows download speeds of P2P users to a crawl, making it a painfully frustrating means of file-sharing. This is in an effort by ISPs to regulate and prevent illegal file-sharing under the guise of a network management practices to reduce user "congestion". Therefore to prevent such "de-priorisation", pirates allow for the encryption of data transmissions and prevent the slowing of P2P users' capped download and upload rates. For more information on such congestion combatting practices see: Benjamin Lennett, "Dis-Empowering Users vs. Maintaining Internet Freedom: Network Management and Quality of Service (QoS)" (2009) 18 *CommLaw Conspectus* 97, 97 - 9.

³⁴⁷ Matthew Humphries, "The Pirate Bay Launches Free VPN Service PrivitizeVPN (Updated)" *TheGeek* (2012) <<http://www.geek.com/articles/news/the-pirate-bay-launches-free-vpn-service-privitizevpn-20120828/>> at 11 October 2012.

³⁴⁸ VPNs are private network servers which are isolated from mainstream internet networks. With the addition of varying levels of security, data traffic streams and user IP addresses are kept totally separate from any form of conventional tracking or regulatory monitoring. For more information please see Microsoft's technical assistance page: <<http://technet.microsoft.com/en-us/library/bb742566.aspx>> at 11 October 2012.

³⁴⁹ Humphries, see note 347 above.

³⁵⁰ Francis Bea, "No Wires, No Laws, No Limits: How a Flying Drone Network Could Liberate the Internet from Above" *DigitalTrends* (2012) <<http://www.digitaltrends.com/cool-tech/no-wires-no-laws-no-limits-how-a-flying-drone-network-could-liberate-the-internet-from-above/>> at 11 October 2012.

³⁵¹ Nick Perry, "Kim Dotcom plans Megaupload Reboot", *The Age* (2012) <<http://www.theage.com.au/technology/technology-news/kim-dotcom-plans-megaupload-reboot-20121012-27gpa.html>> at 11 October 2012.

and are guided by GPS satellite data which automatically and randomly directs its position at any given time.³⁵²

At the forefront, of such a resurgence of innovative regulatory-countermeasures by Internet pirates, is Kim Schmitz.³⁵³ Schmitz, who was indicted for racketeering charges by the American Federal Bureau of Investigation and whose website, *Megaupload.com* was shut down for copyright infringements causing hundreds of millions of dollars worth of damages to the film and music industries since its operation in 2005.³⁵⁴ Schmitz, or more commonly referred to by his monikers, “Dotcom” and “the Pirate King”, however remains undeterred and has announced plans to relaunch a brand new *Megaupload* website by the close of 2012. In a series of twitter messages, Schmitz stated that the new site, dubbed “*new Mega*” will offer a simple one-click encryption option for users to protect their data from being tracked or monitored by United States regulatory watchdogs.³⁵⁵

Schmitz also further went on to state that all data transfer and file-sharing services will be hosted outside of the United States so as to avoid American jurisdictional interference. Along with the relaunching of *megaupload.com*, Schmitz plans to introduce a revolutionary direct download music portal which seeks to eliminate the need for any music industry representation and industry royalty fees related to musician marketing and endorsement. The music portal site, to be called “*megabox*”, also further promises to pay all respective musicians 90% of the revenue generated from the sale and download of their music.³⁵⁶ *Megabox* also embraces the “free-to-use-advertising” business model and goes so far as to

³⁵² Bea, see note 350 above.

³⁵³ For a full video interview of Kim Schmitz with New Zealand’s Broadcasting Campbell Live news program please see: <<http://www.youtube.com/watch?v=ZvrRaeHD5TE&feature=related>> at 12 October 2012. Also, for the full interview transcript, please see: <<http://www.daftpixel.com/2012/01/20/megauploadbust/>> at 12 October 2012.

³⁵⁴ Julian Harris, “The War Against On-line Piracy” (2011) 88 *Institute of Advanced Legal Studies Amicus Curiae* 1, 1. According to Harris, *Megaupload.com* has cost copyright owners more than USD\$500 million worth of losses while at the same time has generated USD\$175 million of proceeds for its own investors and shareholders.

³⁵⁵ Sara Mishkin, “Dotcom Plans to Launch “Megaupload 2.0”, *Financial Times Tech Hub* (2012) <<http://www.ft.com/cms/s/0/fd9f8ab8-1396-11e2-9cc7-00144feabdc0.html#axzz295BAExxF>> at 11 October 2012.

³⁵⁶ Stephanie Mlot, “Kim Dotcom Teases Upcoming Megabox Music Service”, *PC Magazine* (2012) <<http://www.pcmag.com/article2/0,2817,2410249,00.asp>> at 11 October 2012. According to Mlot, Megabox is already very appealing to users since it has already attracted a wide range of music sensations including popular bands and musicians such as Coldplay, Muse, Radiohead, Foo Fighters, David Bowie, Blur and Rihanna.

pay musicians money even for music offered for free, owing to rentable advertising space available on individual musician's profile pages.

This novel approach to the way music is marketed and sold; directly from the creator to their audience via the Internet, is a fresh alternative to what Schmitz claims to be the "outdated monopolistic business model"³⁵⁷ of the RIAA. This echoes the sentiments of Professor Schumpeter who observed that "[e]very piece of business strategy acquires its true significance only against the background of process and within the situation created by it".³⁵⁸ This quote embodies the keys for success required in today's modern Internet age very appropriately and emphasises this: there is no importance in how an industry struggles to protect its existing business model, but rather, how it adapts that model to the new conditions of its ever-fluctuating technological climate. And unless the RIAA or the MPAA can keep up with today's Internet revolutionaries, then such industries will surely be left behind when the Internet and all its denizens reach the plateau of Internet singularity or what is to be the new "digital information commons".

CONCLUSION

The key point of this paper is that the existence of proprietary rights over an intangible concept or idea is inherently problematic since it allows for the attachment of monetary value over something that by its very nature had none to begin with.³⁵⁹ As Karl Polanyi suggests, real property rights were merely reconceptualised so as to alter the notion of what property actually encompassed and was expanded to include the commodification of an intangible good.³⁶⁰ This process of "legal fictionalisation" occurred solely for the purpose of justifying the exchange of an intangible matter within a market for financial gain, and was neither concerned with its social production (how much labour and effort was actually expended in its creation), nor was it concerned about the freedom of access and dissemination of intellectual goods.

Consequently, control-critics are of the belief that intellectual goods should remain, as a natural right, within a public domain that is either free or at a low cost for all to access,

³⁵⁷ Please refer to full interview transcript available here: <http://www.daftpixel.com/2012/01/20/megauploadbust/> at 11 October 2012, at Part 1 paragraph 35.

³⁵⁸ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper Collins, 1975) 83 - 4.

³⁵⁹ May, see note 34 above, 124 - 5.

³⁶⁰ Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Beacon Press, 2nd ed, 1957) 72ff.

peruse and study. As eloquently put forth by Gary Flake in his presentation – entitled “How I learned to Stop Worrying and Love the Imminent Internet Singularity”³⁶¹, human civilisation now possesses the technology and resources to recreate a monolithic online database of knowledge. A modern legendary library of Alexandria so to speak, containing every imaginable musical score, literary work or technological blueprint. If such a digital realm truly existed, it would undoubtedly spawn a wealth of creative thinking from any individual who engages and interacts with it. Though this has yet to come to pass, it is not so far-fetched since the current world-wide-web seems to be unconsciously growing and gaining momentum toward this end.³⁶²

Intellectual property rights, however, threaten the realisation of this utopian dream. In March of 2011, the United States District Court ruled against Google’s continued attempts to create the world’s largest online library.³⁶³ Since early 2004, Google has commenced scanning and cataloging millions of books from various sources, including some of the world’s greatest libraries such as Oxford’s and Harvard’s University libraries.³⁶⁴ In his *ratio decidendi*, Chin J stated that “[w]hile the digitisation of books and the creation of a universal digital library would benefit many”, he added that Google had gone “too far” in its ambitious project to make the millions of scanned books accessible online through Google’s own eBooks³⁶⁵ reading platform. And would “give [itself] a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission”. This judicial reasoning reinforces the modern belief that the law and the judicial system is to uphold proprietary rights as being supremely sacred; far above any other notions of social welfare or benefit.³⁶⁶

³⁶¹ Gary Flake, “How I Learned to Stop Worrying and Love the Imminent Internet Singularity (speech delivered at Search Champs), transcript available here: <<http://castingwords.com/transcripts/O3/5073.html>> at 7 September 2012.

³⁶² Charles W. Bailey Jr, “Strong Copyright + DRM + Weak Net Neutrality = Digital Dystopia?” (2006) *Information Technology and Libraries* 116, 116.

³⁶³ Dominic Rushe, “US Judge Writes Unhappy Ending for Google’s Online Library Plans”, *The Guardian* (2011) <<http://www.guardian.co.uk/technology/2011/mar/23/google-online-library-plans-thwarted>> at 11 October 2011.

³⁶⁴ William Skidelsky, “Google’s plan for World’s Biggest Online Library: Philanthropy or Act of Piracy?” *The Guardian* (2009) <<http://www.guardian.co.uk/technology/2009/aug/30/google-library-project-books-settlement>> at 11 October 2011.

³⁶⁵ Google’s ebook reading platform is still available here: <<http://books.google.com/>> at 11 October 2012. It however does not allow the viewing of full content or entire books, rather it allows a limited preview, of up to 10% as allowed under current fair use exceptions.

³⁶⁶ Lessig 2, see note 169 above, 260.

Looking back almost a century ago, in 1918, Brandeis J eloquently enshrined the baseline of where intellectual property laws should be drawn, or rather what kinds of information should not be subject to protection in order to give due deference to the basic human rights of liberty and free access.³⁶⁷ In *International News Service v Associated Press*, Brandeis J states that the general rule of law should never falter in upholding a person's right to access "the noblest of human productions of information", such as knowledge, ascertainable truths and ideas, which should be as "free as the air to common use".³⁶⁸ And that the freedom to access such information should only be restricted in extreme situations where public policy demands it.³⁶⁹ By comparing the two judicial reasonings presented above, it would seem that human civilisation has regressed far beyond what Brandeis J envisioned.³⁷⁰ And humans now inhabit a world where the noblest of human productions are more commonly protected and barred from public access even where public policy demands it.³⁷¹

Though this essay has painted a rather bleak landscape of the current global intellectual property climate, the Internet however does offers us a glimmer of hope for the survival of the free informational commons. In spite of the continual attempts to regulate and control it, the Internet will continue to thrive as a result of its neutrality, that is to say pirates and right-

³⁶⁷ Benkler, see note 49 above, 354 - 5.

³⁶⁸ *International News Service v Associated Press* (1918) 248 U.S. 215, 250 per Brandeis J (Dissenting).

³⁶⁹ *Ibid*, at 251 per Brandeis J (Dissenting).

³⁷⁰ Benjamin Coriat and Fabienne Orsi, "Establishing a New Intellectual Property Rights Regime in the United States Origins, Contents and Problems" (2002) 31 *Research Policy* 1491, 1491 - 2. In their paper, Coriat and Orsi state that intellectual property rights have been extended to include software patents, business models and living entities - all of which mark a relaxation of the patentability and protection criteria of intellectual property laws.

³⁷¹ Also, another troubling modern encroachment into the realm of the informational commons, would be the extension of copyright laws over "mere compilations of facts", or "mere expressions of truth" which could further stifle the dissemination of scientific fact and data. This position is prevalent in Australia, following the High Court case of *IceTV Pty Limited v Nine Network Australia Pty Ltd* [2009] HCA 14 (appeal case) - which opined that if a plaintiff can demonstrate that sufficient skill and labour has gone into the factual compilation and if its reproduction is expressed in a similar manner, then the plaintiff can rightfully enforce their rights against the infringer through Australian copyright Laws. Also this legal principle has be codified in America via statute, see *Collection of Information Antipiracy Act* 1999 H.R.354 for the 106th Congress, s 2291.

holders share the digital-space of the Internet concurrently as neighbours.³⁷² Moreover, the Internet is structured in such a way that it is impossible to expect users to adhere linearly to a singular legitimate content source. In reality users engage in a blend of both activities; legitimate content purchasing and illegitimate file-sharing. Therefore, unless corporate entities respect this co-existence, then their repeated attempts at restricting users' liberties will only encourage more users to embrace the liberatory potential that illicit alternatives offer.³⁷³

³⁷² In his testimony before the Senate Commerce Committee, Lawrence Lessig aptly puts across this sentiment as he stated that "in the world of digital communication infrastructures, the Internet is everything, supporting a multiplicity of content, applications and services" and that the Internet's function was to "support the widest possible variety of services and functions". This shows the duality of content made available on the Internet - which is neither solely legitimate or illegitimate, but is structured such that both are readily available to users. Please see: Lawrence Lessig, C Wendell and Edith M Carlsmith, *The Future of the Internet* (Hearing Before the United States Senate Committee on Commerce, Science and Transportation) on 22 April 2008, 7.

³⁷³ Ronald V Bettig, "The Enclosure of Cyberspace" (2009) 14(2) *Critical Studies in Mass Communication* 138, 157.

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